BANKING

AND

NEGOTIABLE INSTRUMENTS

A MANUAL OF PRACTICAL LAW

BY

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PREFACE TO FOURTH EDITION

The preface to the second edition expressed the hope that the book as then enlarged, while retaining its utility as a practical book for business men, would serve a useful purpose as a text-book for the examinations of the Institute of Bankers. This expectation has been realised, and the chief alterations contained in the third and the present editions are certain additions embodying changes in Statute Law and the more important decisions of the Courts.

References to the Companies (Consolidation) Act 1908 inserted in the text, and the Addenda of Notes on some recent cases placed at the beginning, will, it is hoped, bring this edition up to date.

FRANK TILLYARD.

Birmingham University,
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PREFACE TO FIRST EDITION

The object of this small book is to deal concisely and simply with the practical legal questions which arise in the course of a banker's business. With this end in view, a considerable part of the book has been devoted to the consideration of the various kinds of securities that a customer, wishing to borrow money from his bankers, may present to them. No book on Banking has heretofore dealt with this aspect of the subject. The author, while intending the book primarily for men of business, has sought to make it useful to lawyers, by giving the name of the principal or best authority for the propositions enunciated by him; starting from such authority, subordinate and analogous cases will readily be found. The author, in several chapters, and particularly in Chapter XVII., has had to discuss questions on which the leading lawyers of the day have disagreed; and if he appears unduly dogmatic, he must plead the view of the client who is said to have preferred a wrong opinion to no opinion at all.

F. T.

11 Old Square, Lincoln's Inn,
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ABBREVIATIONS USED

A. C. . .	Law Reports, Appeal Cases.
A. & E. .	Adolphus & Ellis.
B. & A. .	Barnewall & Adolphus.
B. & Ald. .	Barnewall & Alderson.
B. & C. .	Barnewall & Cresswell.
Beav. . .	Beavan.
Bing. . .	Bingham.
Bing. N. C. .	Bingham's New Cases.
Burr. . .	Burrows.
Ch. . .	Law Reports, Chancery.
Ch. Ap. .	,, ,, ,, Appeals.
C. B. . .	Common Bench.
C. B. N. S. .	,, ,, New Series.
Ch. D. .	Law Reports, Chancery Division.
C. & M. .	Crompton & Meeson.
C. & P. .	Carrington & Payne.
Camp. . .	Campbell.
Cl. & Fin. .	Clark & Finelly.
Com. Cas. .	Commercial Cases.
C. P. . .	Law Reports, Common Pleas.
C. P. D. .	,, ,, ,, ,, Division.
De G. M. & G. .	De Gex, Macnaghten & Gordon.
E. & B. .	Ellis & Blackburn.
E. & I. .	Law Reports, English and Irish Appeals.
Eq. . .	Equity.
Ex. . .	Exchequer (Welsby, Hurlstone & Gordon).
Giff. . .	Gifford.
Hart . .	Heber Hart's Law of Banking (2nd ed.).
H. & C. .	Hurlstone & Coltman.
H. of L. Ca. .	House of Lords Cases (Clerk).

H. & M.	Hemming & Miller.
H. & N.	Hurlstone & Norman.
L. J. Bk.	Law Journal, Bankruptcy.
L. J. Ch.	,, ,, Chancery.
L. J. C. P.	,, ,, Common Pleas.
L. J. Ex.	,, ,, Exchequer.
L. J. Q. B.	,, ,, Queen's Bench.
L. T.	Law Times.
Leake	Leake on Contract.
Loyd	Loyd, Four Lectures on Bills of Exchange.
M. & R.	Manning & Ryland.
M. & W.	Meeson & Welsby.
Macq.	Macqueen, House of Lords Cases.
Man. & G.	Manning & Granger.
Mer.	Merivale.
Moore P. C.	Moore's Privy Council.
My. & C.	Mylne & Craig.
Ph.	Phillips.
Q. B.	Queen's Bench (Adolphus & Ellis).
Q. B.	,, ,, (Law Reports).
Q. B. D.	Law Reports, Queen's Bench Division.
Taunt.	Taunton.
T. L. R.	Times Law Reports.
Ves.	Vesey.

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(Where there is more than one reference to a case, the heavier type denotes the fuller treatment of it at that page.)

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ADDENDA

NOTES ON SOME RECENT CASES

THE following *obiter dictum* should be noted :—"It is no part of the duty of a banker, when asked for information as to the financial standing of a customer, to make inquiries outside as to the solvency or otherwise of such customer ; he is not bound to do more than answer honestly the question he is asked from what he knows from the books and accounts before him." Page 83, line 22.

In the case of Page 104, line 8.

Cuthbert v. *Robarts, Lubbock & Co.* (1909, 2 Ch., 226),

it was held that though bankers have a general lien upon the securities of a customer deposited with them to secure an overdraft, this lien does not attach to securities deposited by a customer and known to the bank to belong to some other person and to have been deposited for a special purpose.

Where a customer draws a cheque for a sum in excess of the amount standing to the credit of his current account, it is in effect a request for a loan, and if the cheque is honoured the customer has borrowed money ; but it does not follow that a transaction of this kind is a borrowing upon security not belonging to the customer, and deposited for another purpose.

In the case of Page 120, line 9.

Holland v. *Manchester and Liverpool District Banking Co.* (14 Com. Cas., 241),

it was held that entries by a banker in his customer's pass-book, although subject to adjustment, are *prima facie* evidence against the banker of the amount standing to the credit of the customer, and the customer in the absence of negligence or fraud on his part is entitled to rely upon such entries.

The true balance was £60, 5s. 9d. ; by the mistake of a clerk who entered one cheque twice over the balance appeared to be £70, 17s. 9d. The customer drew a cheque for £67, 11s., which was dishonoured. It was held that the customer was entitled to damages on the footing that the banker had wrongly dishonoured the cheque.

Lunatic customer.—A customer of a bank became of unsound mind. His son arranged with the bank to continue the Page 144, line 6.

lunatic's account and to draw upon it for the maintenance of the lunatic's household and the necessary outgoings of his estate. At the death of the lunatic this banking account was overdrawn. *Held* that the bankers were entitled to stand in the shoes of the creditors paid by the son, but that the bank were not entitled to prove for interest and commission on the overdraft, the debts of these creditors not bearing interest. In re *Beavan, Davies Banks Co.* v. *Beavan*, 1 Ch. D., 1912, p. 196.

Page 152, line 32. *Account opened in Agent's name.*—Where a principal places money in a bank on the terms that a known agent shall draw upon it, he retains the power, if he rightly determines the agency, to require the bank to return the undrawn balance to him. The bank is not justified in opening an account in the agent's private name. *Société Coloniale Anversoise* v. *London and Brazilian Bank, Limited* (16 Com. Cas., 158 and 17 Com. Cas., 1).

Page 155, line 13. The principle enunciated in the case of *Brocklesby* v. *Temperance Building Society* is applicable notwithstanding the fact that the principal hands to the agent a blank transfer of shares. As to those, see pp. 302–3.

In the case of *Fry* v. *Smellie* (3 K. B., 1912, p. 282) it appeared that the registered holder of shares in a public company handed to an agent the indicia of title together with a transfer of the shares signed in blank, and instructed him to borrow not less than a certain sum on the security of the shares. The agent, in defiance of his instructions, borrowed upon the shares a less sum than the stipulated amount. It was held that, as against the principal, the lender was entitled to retain the indicia of title to the shares until repayment of the amount of his loan.

Page 171, line 13. 2A. The unreported case on p. 171 has been confirmed in two cases. In

Kepitigalli Rubber Estates v. *National Bank of India* (1909, 14 Com. Cas., 116),

it appeared that the secretary of a Company forged the signatures of certain of the directors to a number of cheques purporting to be drawn on behalf of the Company, and obtained payment thereof from the Company's bankers. The Company claimed to recover from the bankers the amount so paid. It was held that the fact that the directors had not regularly examined the Company's cash-book and pass-book during the period of two months during which the forgeries were committed did not preclude the Company from recovering. It was also held that the fact that the pass-book, which

contained entries of the forged cheques, had been returned to the bank without objection being taken by the Company, who at the time had no knowledge of the forgeries, did not constitute a settled account between the bankers and the Company. The Court laid down the principle that, as between a bank and its customers, there is no implied agreement by the latter to take precautions in the general course of carrying on their business to prevent forgeries on the part of their servants, though it is the duty of a person giving a mandate to take reasonable care that he does not mislead the person to whom the mandate is given, and this applies as between a customer and his banker. In the course of its judgment the Court commented on *Vagliano* v. *Bank of England* (see p. 177 *post*) as follows:

"Lord Halsbury's decision in *Bank of England* v. *Vagliano* seems to be based on this—that Vagliano by his own acts in relation to the bills themselves misled the bank. Two acts were mainly relied on, first, that Vagliano himself accepted the bills as genuine bills when in reality they were not bills at all; secondly, that by a separate writing—namely the letter of advice—he told them that the B/E were coming due and were to be paid out of his account, when in fact no such bills existed. He expressly states that the carelessness or neglect of the customer to take precautions unconnected with the act itself cannot be put forward by the banker as justifying his own default. Lord Bramwell said: 'I think it is necessary for the bank to show that the plaintiffs caused the bank to pay these bills. It is not enough to show that they gave occasion to their doing so, and that different conduct would have prevented fraud and the payment by the bank.'"

In the case of *Walker* v. *Manchester and Liverpool District Banking Co.*, 20 T. L. R., 492, it appeared that the clerk of a customer of a bank forged the customer's signature to three cheques and obtained payment of the same from the bank. It was held that the fact that the customer did not examine his pass-book when it was periodically returned to him by the bank did not preclude him from recovering.

These two cases are illustrations of the general principle laid down in *Lewes Sanitary Steam Laundry* v. *Barclay Bevan and Co.* (1906, 11 Com. Cas., 255), where it was held that in order to relieve a banker from the consequence of paying money upon a forged cheque, it is not enough for the banker to show that the conduct of his customer, wilful, careless, or wasteful, or all three, enabled the fraud to be committed; he must show that the customer's conduct caused him to pay the money upon the forged cheque.

Page 173, line 14; page 242, line 19; page 245, line 20.

In reading the cases of *Lloyds Bank* v. *Cooke* (1907, 1 K. B., 361) and *Baxendale* v. *Bennett* (1878, 3 Q. B. D., 525), it should be carefully borne in mind that in the former case the blank stamped paper was "issued," and in the latter case "not issued." In the case of *Smith* v. *Prosser* (1907, 2 K. B., 735) this distinction is clearly brought out. In that case the defendant in South Africa, being about to leave for England, gave to two persons a power of attorney to act for him in his absence. He further, in anticipation of the possibility of funds being suddenly required during his absence, signed his name on two blank unstamped pieces of paper, which were lithographed forms of promissory notes, and handed them to one of the two agents with instructions that they should be retained in the custody of his attorney until the defendant should, by letter or telegram from England, give instructions for their issue as promissory notes and as to the amounts for which they should be filled up. After the defendant had left South Africa, the attorney to whom he had handed the documents, without waiting for instructions from the defendant (which were in fact never given), and in fraud of the defendant, filled in the blanks in the documents so as to make them appear to be promissory notes for considerable sums and sold them to the plaintiff, who took them honestly and in good faith, and without notice of the fraud, and gave full value for them. For the purpose of suing upon them in England, the notes were stamped as foreign bills.

Held that as the defendant handed the notes to his agent as custodian only, and not with the intention that they should be issued as negotiable instruments, he was not estopped from denying the validity of the notes as between himself and the plaintiff, and that the action was not maintainable. The case of *Lloyds Bank* v. *Cooke* was distinguished. Buckley, L. J. said: "This appeal fails on the ground that the promissory notes never became negotiable instruments, the reason being that the defendant never issued them, nor authorised any one else to issue them, as negotiable instruments. The result is the same as though the defendant had said to his attorney, 'I hand you this piece of paper bearing my signature; keep it as my custodian, because it may be convenient in the future to make you my agent for its issue as a promissory note.'"

Page 174, line 20.

In the case of

Curtice v. *London, City & Midland Bank* (1908, 1 K. B., 293),

it was said by Cozens-Hardy, M.R. (at p. 298) that "a telegram may, reasonably and in the ordinary course of business, be acted

upon by the bank, at least to the extent of postponing the honouring of the cheque until further inquiry can be made. But I am not satisfied that the bank is bound as a matter of law to accept an unauthenticated telegram as sufficient authority for the serious step of refusing to pay a cheque."

Collection of a crossed cheque drawn with a "per pro" signature. Page 197, line 31.

The case of *Morison* v. *London, County & Westminster Bank* (18 Com. Cas., 137) is an important authority on negligence within the meaning of section 82 of the Bills of Exchange Act. In that case it appeared that in 1888 the plaintiff gave the National Provincial Bank written authority to pay and honour all cheques drawn by A, his manager, or purporting to be drawn by him *per pro* the plaintiff, or on his account. In 1907 A opened a private account with the London, County & Westminster Bank, and in fraud of the plaintiff he drew and endorsed cheques on the National Provincial Bank in his own name *per pro* the plaintiff, and payable to himself, and paid these into that private account. The plaintiff brought an action to recover from the London, County & Westminster Bank the amount of the cheques wrongfully paid by A into his account with them.

Certain facts were put in evidence by way of proving that A had either ratified the acts of his manager or was estopped from repudiating A's authority, but as the plaintiff had never been aware that A had opened an account in his own name these defences failed. The Court held that the signature *per pro* of A on the cheques was notice to the London, County & Westminster Bank that A had only a limited authority, and it was incumbent on them to ascertain from the plaintiff whether A in so signing was acting within the terms of his authority, and as they had not made such inquiries they had been negligent in dealing with the cheques, and the plaintiff was entitled to recover the amount of the cheques from the London, County & Westminster Bank.

In the course of the judgment the following observations were made:—"The question is, can the plaintiff recover against the defendants, or are the defendants protected by section 82 of the Bills of Exchange Act 1882? It is clear that as between the plaintiff and the National Provincial Bank the plaintiff had given the bank authority to cash the cheques drawn by A *per pro* the plaintiff, and it was not the business of the National Provincial Bank to inquire to what purpose the money was applied: see *Backhouse* v. *Charlton* (*post*, p. 149). The plaintiff could have no right of action against the National Provincial Bank in respect of any cheques signed by

A within the letter of the authority given to them. Was, then, the London, County and Westminster Bank in any worse position with regard to the plaintiff than the National Provincial Bank? *Prima facie*, they were clearly guilty of conversion. They had dealt with the plaintiff's money in crediting the customer's account. The plaintiff had not authorised them to do so by himself or his agents, but they plead section 82 of the Bills of Exchange Act 1882 by way of defence, and say that in good faith and without negligence they received payment for A of these cheques crossed generally or specially to themselves, and therefore they have not incurred any liability to the true owner of the cheques, the plaintiff, by reason only of having received such payment. Section 25 of the Bills of Exchange Act 1882 declares that a signature by procuration operates as a notice that an agent has but a limited authority to sign, and the principal is only bound by such signature if the agent so signing was acting within the limits of his authority. This section is declaratory of the common law. Misapplication of the proceeds of such a cheque by the agent does not bind the principal where the limited authority is exceeded. . . . If section 25 is to be read with section 82, then the collecting banker claiming the protection of section 82 cannot dispute that when he receives a cheque which is signed by procuration, he has notice that the agent has but a limited authority to act on behalf of his principal. A distinction must here be drawn between the authority to sign and the authority to utilise the signature in the way effected. So far as the National Provincial Bank was concerned, there was no need for them to inquire. They had direct authority to do what they did, namely honour cheques signed in accordance with their instructions. As regards the London, County and Westminster Bank, they had no instructions from the plaintiff. I am of opinion that the effect of reading sections 25 and 82 of the Bills of Exchange Act 1882 together is, that in the case of the London, County and Westminster Bank they must be taken to have had notice that the plaintiff as principal would only be bound if the agent was acting within the limits of his limited authority. In fact, the London, County and Westminster Bank made no inquiries. Were they bound to do so? And, if so, what inquiries should they have made, and of whom? I think they were bound to make inquiries into the intent of the limited authority. In fact, a signature 'per pro' is notice that the person so signing professes to act under an authority of some principal, and imposes on the collecting bank the duty of ascertaining that the party so signing is acting within the terms of such authority. If the defendants, the collecting bank, made no

inquiries, or inadequate inquiries, and if the agent has exceeded the limits of his authority, the defendants take the risk and must suffer from their temerity. Therefore I am of opinion that in not making these inquiries the defendants were negligent."

Page 231, line 23.

Bearer bonds as securities.—It follows from the negotiability of these instruments that they cannot be impressed with a vendor's lien or an implied trust (*Lloyds Bank and others* v. *Swiss Bankverein*, 18 Com. Cas., 79). In this case the plaintiff banks lent money on bearer bonds to a firm of bill brokers. They called in these loans, and in accordance with the general practice in such cases the bill brokers, on the morning that the loans were repayable, went to the plaintiffs, gave each of them a cheque for the amount of the call, and received in exchange the bonds that had been deposited as security. The cheques having been dishonoured, the plaintiffs sued the defendants, who had received in the course of the same day the bonds in question from the bill brokers, the plaintiffs alleging that by a practice or usage the bonds remained constructively in their possession, or were impressed with a trust in their favour, until the cheques were honoured. It was held in the court of first instance that the plaintiffs had failed to establish such a practice or usage, and in the Court of Appeal that such usage was repugnant to the nature of the instruments.

Page 247, line 10.

Where there are two or more accommodation parties to a bill, they are co-sureties, and as between themselves the liability must be shared equally. Thus in *Godsell* v. *Lloyd* (27 T. L. R., 383) it appeared that a husband and wife were parties to a promissory note as makers, and the husband's brother was the payee who indorsed the note for the accommodation, as he believed, of both husband and wife. In fact, the wife only signed the note for the accommodation of her husband. The note having been dishonoured, it was held that the wife and the payee were co-sureties, and that as between them the wife was only liable for half the amount of the note.

Page 295, line 14.

In the case of

Deeley v. *Lloyds Bank, Ltd.* (A. C., 1912, p. 756),

it appeared that S mortgaged his business premises first, in 1893, to a bank to secure an overdraft on his current account limited to £2500, and, secondly, in 1895 to D to secure £3500, and this latter mortgage was expressed to be subject to the earlier. Notice of the second mortgage was given to the bank on the date of its execution, but was forgotten, and they continued the account as one unbroken account instead of opening a

fresh account. S from time to time made payments into his account, which, if applied according to the rule in Clayton's case (see p. 65), would have paid off the moneys due to the bank at the date of the second mortgage. An unsuccessful attempt was made to show that the course of dealings was such as to exclude the rule in Clayton's case. It was held that by the conjoint operation of that rule and the principle of *Hopkinson* v. *Rolt*, D's mortgage was entitled to priority.

Page 306, line 30.

In the case of

Fry v. *Smellie* (3 K. B., 1912, p. 282),

the following observations were made on France v. Clark. *Vaughan Williams, L. J.* (at p. 289) said : "In *France* v. *Clark*, France, the registered holder of shares in a company, deposited the certificates together with a blank transfer with Clark, as security for £150, and Clark deposited the certificates and the blank transfer with Quihampton as security for the sum of £250 previously lent to Clark by him. Clark therefore was simply a mortgagee or pledgee, and in no sense an agent of France with limited authority ; and there was no need to apply the rule that an owner who gives indicia to an agent and authorises him to deal with such indicia either for the purpose of raising money or sale, owes a duty to the persons whom he intends to act on such authority to give them notice of any limit that he places on the authority. Clark wrongfully pledged or mortgaged to Quihampton documents which he held as a security for a loan of £150, as security for a loan of £250, previously advanced by Quihampton to him. There was no intent on the part of France to do anything but create an equitable security in Clark as pledgee or mortgagee for £150. When one deals with transfers of this sort, not of property, but of documents giving a right to registration in the books of the Company as the holder of specific shares, the relation of the transferor to the transferee is of essential importance. In my opinion, the mere fact of the transfer being a blank does not put the transferee on inquiry as to the authority of the transferor independently of the relation of the registered owner to the transferee."

Farwell, L. J. (at p. 297) said : "The question of authority by holding out was never suggested, because it was obvious that a man who creates an equitable charge on his shares by such deposit and blank transfer holds out nothing. He gives the mortgagee an equitable title, with power to complete his legal title, and to deal with that title when completed ; but he gives him no authority or right over any equitable interest, except to the extent of his own mortgage."

BANKING

CHAPTER I

INTRODUCTORY

The exigencies of modern commerce demand in many cases that one person or body of persons shall fulfil many functions. The banker of to-day is no exception to this rule, and, under stress of competition, has taken upon himself many duties which can conveniently be performed along with the necessary business of a banker. It will always be useful to be able to distinguish those functions which are of the essence of banking, and originally called banking into existence, from those other functions which the banker, once called into existence, has taken upon himself either for the convenience of his customers or his own profit.

The earliest English bankers were goldsmiths, who, in the times of commotion preceding the Commonwealth, were willing to receive the money of customers under a promise to repay it, with interest, upon the demand of their customers. The receipt of money, under a liability to repay it upon demand, is still the basis of banking.

The receipts which the goldsmith gave in return for his customer's money constituted the earliest form of bank note. When the first goldsmith or banker discovered

that, on an average, only a small percentage of the money entrusted to him was required at a given time, and that accordingly the possession of a certain amount of gold was enough, while his credit remained good, to enable him to promise to pay on demand very much larger sums, banking was established as a lucrative trade.

For instance, let us suppose an early banker had been entrusted by his customers with the custody of £100,000 in gold, and that against this he had issued bank notes for £100,000 payable on demand to his customers. He finds that if he keeps £30,000 in gold he always has enough gold to meet the demands made upon him, because while some of the customers come for payment, others leave their money with him, or even bring more gold. What is he to do with the £70,000? He soon finds that other customers come to borrow instead of to deposit. He accordingly lends them money, not in gold, but in more bank notes. Experience teaches him that he can issue, at ordinary times, say £300,000 worth of bank notes either to his depositing customers, or to his borrowing customers, without being asked to cash more than £100,000 at any one time. As he receives a higher rate of interest on his loans than he gives on the money deposited with him, he stands to make a considerable profit. The larger the proportion of bank notes to gold, the larger is his profit, but so also is his risk of some day finding himself unable to meet a greater demand than usual for cash in exchange for his notes.

The issue of promissory notes by a goldsmith or banker by way of loan was the second stage in the development of banking.

Roughly speaking, for a hundred years banking meant the receipt of money coupled with the issue of bank notes. The most important change that has since occurred in

the nature of banking was brought about by the invention and adoption of cheques. These came into use about the year 1780; and from about that time London banks, other than the Bank of England, voluntarily began to discontinue their note issue. In the provinces bank notes were now issued, not in amounts equivalent to the customer's deposit, but merely to the extent of the express demand for them. The banker gave his customer, not a roll of bank notes, but a book of order forms payable to bearer on demand, and the banker undertook to honour such orders as long as he had assets of the drawer in his hands. "These order forms were 'to bearer' and 'on demand' in imitation of the notes which they were intended to supersede. And just as the promissory notes bore registered numbers for ready verification when the note was presented for payment, so these books of forms bore registered numbers as a check or means of verification if, when the order should come to be presented for payment, there should be any doubt of its genuineness. The books came to be called 'check' books, and the forms 'checks,' and are familiar with the consecutive registered numbers which these books bear on the counterfoils and on the order forms to the present day. The paying banker is thus enabled to see, by a glance at the record in his possession, to whom was originally issued the book of forms from which the order form presented to him has been detached." (Loyd, p. 111.)

The modern definition of a banker will now explain itself. "A banker is one who, in the ordinary course of his business, receives money, which he repays by honouring the cheques of the persons from or on whose account he receives it." (Hart, p. 1.)

It has been said that the London banks after 1780 began to discontinue their note issue, though still retain-

ing their rights of issue. They became what are now called "banks of deposit" in contrast with "banks of issue"; but it was not till about fifty years later that it was realised that "banks of deposit," without any rights to issue notes, were lawful institutions, and that joint stock banks, which could not issue notes, might yet be started purely as banks of deposit. More is said on this point in subsequent chapters.

The commercial difference between an old bank of issue, whose issue of notes was unrestricted, and a modern deposit bank is, that on the debtor side of an imaginary balance-sheet of the former the chief item would be, "*Dr.* to bank notes issued," an item which is only limited by the willingness of the general public to keep the notes in circulation; whereas, in the case of the latter, the chief item would be, "*Dr.* to sums due by the bank on current and deposit accounts," an item which is limited by the number and wealth of the customers of the particular bank. Bank notes, so far as they are issued by way of advances, constitute an increase of the working capital of the issuing banker, for which he pays nothing beyond the cost of paper and printing, his licence, and the composition for the stamp-duty. Accordingly, with an unrestricted issue, there is every temptation for a banker to issue as many notes as possible. The working capital of a deposit bank, consisting as it does mainly of deposits of customers, is charged with the payment of interest to them. As, however, interest is generally paid on minimum balances, and not at all on small balances, this payment does not heavily handicap the deposit banks. For example, the London and County Bank, at the end of the half-year ending June 31st, 1890, owed on deposit and current accounts £33,804,035, and had paid during that period for

interest £153,397, or a little less than 1 per cent. per annum.

An examination of an actual balance-sheet will be a considerable help in getting a general idea of a banker's functions, the sources of his profit, and the risks he runs. On the following page will be found a recent half-yearly balance-sheet of the London City and Midland Bank, Ltd.

From the "liabilities" side of the balance-sheet it will be seen that the bank has the use of something over six millions of money, representing shareholders' capital and reserve fund, on which the only payment—that of dividend on capital—is contingent on a profit being made. The chief working asset is, however, the fifty millions owing on current, deposit, and other accounts for the repayment of which the bank is liable. For this some interest is payable, but probably not over 1 per cent. per annum. The other liability is an amount of four millions for bills of exchange, accepted by the bank on account of its customers. On the other side will be seen what the bank does with its resources. First of all, it should be noticed that between a million and a quarter and a million and a half is permanently sunk in bank premises. This, of course, means a great saving in rent, but represents the least fluid asset which the bank holds. Then nearly nine millions is cash in hand or at the Bank of England, and earns no interest. Another seven millions is money at call and short notice, and probably earns about 2 per cent. These two items are the bank's "liquid assets," and they amount to about 32 per cent. of the bank's liabilities on current, deposit, and other accounts. The liability on current accounts is, of course, to pay on demand, while the deposits may be repayable on seven days' or longer notice. A working rule is to keep the liquid assets at about one-third of the bank's immediate

THE LONDON CITY AND MIDLAND BANK, LIMITED.

Dr. *BALANCE SHEET, 31st DECEMBER 1905* *Cr.*

LIABILITIES.

	£	s.	d.
To Capital paid up, viz.: £12, 10s. per Share on 251,428 Shares of £60 each,	3,142,850	0	0
„ Reserve Fund,	3,142,850	0	0
„ Dividend payable on 1st February 1906,	282,856	10	0
„ Balance of Profit and Loss Account, as below,	119,001	19	4
	6,687,558	9	4
„ Current, Deposit, and other Accounts,	50,259,087	12	8
„ Acceptances on Account of Customers,	4,115,866	13	5
	£61,062,512	15	5

ASSETS.

				£	s.	d.
By Cash in hand and at Bank of England,	£8,795,944	15	6			
„ Money at Call and at Short Notice,	7,291,650	18	7			
				16,087,595	14	1
„ INVESTMENTS:						
Consols and other British Government Securities, (of which £372,000 Consols is lodged for Public Accounts).	£3,319,395	12	9			
Stocks Guaranteed by the British Government. Indian Stocks, Indian Railway Guaranteed Stocks and Debentures,	873,984	10	0			
British Railway Debenture and Preference Stocks, British Corporation Stocks,	2,266,213	13	11			
Colonial and Foreign Government Stocks and Bonds,	615,021	13	3			
Sundry Investments,	317,976	5	8			
				7,392,591	15	7
„ Bills of Exchange,				4,713,332	17	11
				28,193,520	7	7
„ Advances on Current Accounts, Loans on Security and other Accounts,				27,402,317	5	8
„ Liabilities of Customers for Acceptances as *per contra*,				4,115,866	13	5
„ Bank Premises, at Head Office and Branches,				1,350,808	8	9
				£61,062,512	15	5

liabilities. The seven and a half millions represented by investments would yield from 3 per cent. to $3\frac{1}{4}$ per cent. on an average; they are "gilt-edged" securities, but in times of panic might be realisable only at a considerable discount. Almost half the assets are represented by advances and loans on security; these bring in the largest profit. An advance on current account is charged with "commission" as well as "interest," and as half-yearly balances are struck, the banker gets compound interest with half-yearly rests. But it is here that the banker makes possible losses by the failure of his customers, or the depreciation or mistaken valuation of the security taken. Bills of exchange figure as assets to an amount exceeding four and a half millions. These are bills discounted by the banker. On these the banker makes the extra profit involved in the difference between "discount" and "interest." Also the price paid to the customer is credited to his current account, and will not be all drawn out at once, so that the banker will still be having the use of a proportion of the price paid.

In London, it is usual for a bank to make a fixed charge for keeping the customer's account unless a minimum balance is always kept to the customer's credit. In the provinces a commission is charged on all payments into the account, but in some districts interest is paid on the minimum monthly balances; in other districts no interest is paid on current account balances, but any substantial sum to the credit of the account can be placed on deposit, and bears interest, but can be drawn against without notice subject to the forfeiture of a few days' interest. A banker's gross profits are therefore made up of dividends on investments, interest on advances, commission and bank charges, and profit on discounting. From this must be deducted his bad debts

interest on current and deposit accounts, and the salaries of the bank staff, and other office expenses. The net profits of the half-year covered by the balance-sheet given above were over £300,000. Many of the banker's functions have now been incidentally pointed out,—*e.g.* his duty to honour his customer's cheques, to accept bills of exchange made payable at the bank, and to advance money on security or by discount of bills of exchange. His other principal functions are to act as the customer's agent in collecting cheques and dividends, and receiving payment of bills of exchange; to take charge of title-deeds, securities, and other valuables which can be stored in a small compass; to invest specific sums according to his customer's orders; and to make periodical payments for him, and issue for his convenience such things as letters of credit and circular notes. All these points will be dealt with more fully in subsequent chapters.

CHAPTER II

BANKING LEGISLATION

Establishment of the Bank of England.—During the period which saw the establishment of banking as a distinct business, a period extending roughly from the beginning of the Commonwealth up to the Revolution, there was no special legislation dealing with banking. Any person or any number of persons in partnership were free to issue their promissory notes in return for money deposited with them, or by way of loan. It is not probable, however, that any of the evils which free trade in bank notes would now produce were then present, or even imagined. The fact that these promissory notes were novelties, and that doubts were felt whether promissory notes at all were on the same footing as bills of exchange, is enough to show us that they were not at that period money in the sense in which they afterwards became so. The first Banking Act was the Act which authorised the grant of a special Charter to the proposed Bank of England in 1694. William III. was at that date in need of cash, and was only too glad to promote the establishment of the bank in return for a loan of £1,200,000. That amount was subscribed within a few hours of the opening of the list. The business of the corporation was confined to banking, as it was expressly

forbidden to trade except in bills of exchange, bullion, and goods deposited as security and not redeemed. The bills of the corporation were to be transferable by endorsement under the hand of the holder, and the assignee was to have the right to sue in his own name. The Act did not in express terms give the bank an exclusive privilege of banking, nor was there in that year any apparent need for such privilege. Two years later another scheme was projected, and an Act for the establishment of a National Land Bank was actually passed; but the capital was never subscribed, and the scheme immediately fell through. The Bank of England, alarmed by the prospect of the creation of rival establishments with statutory privileges, in the next year secured the privilege of being the only bank which was to "be created or established, permitted, suffered, countenanced, or allowed by *Act of Parliament*, within this kingdom." The bank was now secured against the competition of similar corporations.

The beginning of Anne's reign saw the settlement of the question of the character of promissory notes, by the passing of an Act in 1704 declaring that promissory notes were like bills of exchange. The effect of this was to make them transferable by delivery, so that a *bonâ fide* holder for value obtained a good title, and could sue in his own name. The promissory note of a banker or a banking firm thus became a highly useful instrument, and, in effect, part of the currency of the country.

Limitation of Private Banking.—The Bank of England was, however, threatened with another danger. The statutory privileges of that bank did not protect it against private individuals either alone or in partnership. If a score of the wealthiest merchants united in partnership for the purposes of banking, and issued bank notes

secured by their united private fortunes, such a bank might become a serious rival even to so wealthy a corporation as the Bank of England. Accordingly, an Act was passed in the year 1708, to secure still further the monopoly of the Bank of England. This Act is the beginning of the curious connection of banking partnerships with the number 6, which still seems to be in existence so far as regards the issue of bank notes, though opinions differ and the point has never been decided by the Courts. One clause of the Act enacted that it should not be lawful for any body politic or corporate whatsoever, erected or to be erected, other than the Bank of England, or for other persons whatsoever, united or to be united in covenants or partnership exceeding the number of six persons in England, to borrow, owe, or take up any sums of money on their bills or notes payable on demand, or at any less time than six months from the borrowing thereof. For more than a century this, with immaterial alterations, remained law.

Origin of Deposit Banks.—For the whole of this period this legislation was successful in dividing banking business between the Bank of England and private partnerships of not more than six partners, though this was not a necessary consequence of the Act. The custom of entering in bank books, to the credit of a customer, money received from him, and giving to him a cheque-book instead of bank notes, which, as before mentioned, grew up about the year 1780, was in itself sufficient to render this legislation almost nugatory; for it enabled banking to be carried on without the use of bank notes, and the monopoly of the Bank of England as a matter of fact only extended to the issue of notes and certain bills. When this was realised—as was the case about the year 1830—there came into existence, under a declaratory

Act passed in the year 1833, a new class of banks—joint-stock deposit banks—and banking began to assume its modern character. There may be mentioned, as examples, the London and Westminster Bank, founded in 1834; the London Joint Stock Bank and the London and County Bank, both founded in 1836; and the Union Bank of London, founded in 1839.

The exact causes which led banks of issue to give cheque-books instead of notes are not clearly known, but it is obvious that any reduction of the amount of outstanding bank notes on which a bank was liable must have increased its stability. It was not an unknown thing for a bank to collect the notes of a rival bank and present them for payment in quantities sufficient to embarrass or even ruin the bank liable upon them. It is clearly impossible to collect and present customers' cheques in a similar way or with similar consequences.

Joint-Stock Banks of Issue.—When this custom of using cheque-books gained acceptance, the London private banks totally discontinued their note issue, and thus there were, in the early part of this century, private banks of excellent credit which were able, without the use of bank notes of their own issue, to carry on successfully the functions of a bank of deposit, as such banks are now called. After 1833, as has been said, there came into existence many important London banks of deposit formed as joint-stock companies, whose liabilities to the public have become, in several cases, greater than the corresponding liability of the Bank of England. But the earliest banks with more than six partners were formed in the provinces, and as banks of issue under an Act of the year 1826, which owed its origin to the following reasons. The feeling of the mercantile world against state-favoured monopolies had steadily grown during the

great growth of English commerce, which dates from the latter half of the eighteenth century; and the favoured position of the Bank of England, as the only corporation or large body of persons able to issue bank notes, was, in the early part of that century, beginning to be felt an anomaly. Further, the security of a private bank with not more than six partners had been proved to be miserably inadequate if its issue of notes was unrestricted. The payment of Bank of England notes in specie was suspended, owing to the French wars, in 1797. Before long, gold began to go to a premium. In 1801 the value of gold rose to £4, 5s. per oz., or a premium of more than 10 per cent. In 1809 there were seven hundred and twenty-one country banks having a total note issue of £30,000,000, and in that year gold rose to £4, 11s. per oz.[1] In 1813 gold had reached the price of £5, 10s. per oz., or a premium of over 40 per cent. In 1816 eighty-nine country banks stopped payment, and the private note issue of the country was at once reduced one-half. In the next crisis of 1825 there were seventy-six bank failures. In 1826 two Acts were passed, one restricting for three years the issue of bank notes under £5, and the other permitting an extension of banking co-partnerships. The latter Act involved a relinquishment by the Bank of England of part of its privileges, but that bank still retained its old rights in London and the surrounding country. It was enacted that it should be lawful for any bodies politic or corporate with more than six members, and for co-partnerships of more than six persons, to carry on business as bankers in England, provided that they had no establishment as bankers in London, or within sixty-five miles of it, and that the

[1] For the four weeks ending 6th July 1907, the average note issue of all the English Banks of Issue other than the Bank of England was only £516,792.

liability of all members or partners was unlimited. Such bodies or partnerships were empowered to issue their notes on unstamped paper, on giving security and taking out a licence. A co-partnership or company formed under this Act of 1826 was not a corporation, and had therefore no common seal. It was a co-partnership created by deed or articles of co-partnership for a particular purpose, with certain statutable privileges and liabilities. This deed was necessarily of a somewhat elaborate character, and deeds of this character came to be known as deeds of settlement. It could sue and be sued only in the name of one of its public officers, and in all litigious business the company was represented by one of its public officers who must be a member of the company, and individual members could not sue and be sued in respect of transactions with the company till a judgment or decree had been first obtained against the company through one of its public officers. The Act did not confer any authority on the public officer to bind the company, and, although he must be a member of the company, he might have nothing to do with the management of its affairs (*Swift* v. *Winterbotham*, 1873, 8 Q. B., 244). Apart from this special procedure, the liabilities of the members were different from those of ordinary partners. At common law, those members only would be liable who were such when the contract was entered into; but, by the Statute, not only those, but all who became members afterwards, and until the bills, notes, or debts were paid, were made liable. At common law, all the goods of the contracting parties and other persons would be liable to immediate execution; but, by the Statute, the goods of the company were liable, and the members for the time being at the period of execution in the first instance, and afterwards those who were so at

the time of the contracts being entered into or carried into effect, or when the judgment was obtained thereon. At common law the Statutes of Limitations apply, but by the Statute the members who have ceased to be such for three years were exempt from debts of every description (*Stewart* v. *Greaves*, 1842, 10 M. & W., 711). The Statute contained no provision as to the manner in which the company should make or sign deeds, contracts, or documents of any description, and it was held (*Swift* v. *Winterbotham*, supra) that it could not affix its signature to documents otherwise than by the hand of some individual or individuals appointed by the articles of co-partnership to represent the general body in such matters. Under this Act a great many banks, including the National Provincial Bank of England, founded in 1833, were formed, and it is just possible there are some of such banks still in existence that have never brought themselves within later Acts. The history of banking may so far be summed up thus:—

(*a*) Banking meant the issue of bank notes to depositors.
(*b*) Banking meant the issue of bank notes to depositors and borrowers.
(*c*) Banking meant the issue of bank notes as required, and the acceptance of deposits withdrawable on demand by cheque; and
(*d*) Banking meant merely the acceptance of deposits withdrawable on demand by cheque.

Prior to the Act of 1826, no partnership of more than six persons other than the Bank of England could issue bank notes even in the provinces; and prior to the Act of 1833, as a matter of fact, there were no banks of deposit with more than six members.

The Modern Bank Note.—By an Act of the year 1828

all issuing banks, if not carrying on business within the city of London or within three miles of it, were allowed, upon obtaining a special licence to that end and giving security, to issue on unstamped paper promissory notes for any sum of money amounting to £5 or upwards, and expressed to be payable to bearer on demand. From this time bank notes have not been allowed in England for amounts less than £5, and the country bank note assumed its modern form.

The Bank Charter Act.—Meanwhile the evils of an unrestricted note issue were not removed by the abolition of small notes, and in the years 1844 and 1845 Sir Robert Peel made a great attempt to deal with the currency question in all parts of the United Kingdom. The general aim of the legislation of those years was to establish the current circulation of bank notes as a maximum circulation so far as the payment of the notes depended on the credit of the issuing institutions, and to allow an excess over that maximum only when gold coin or gold or silver bullion was held against this excess liability on notes. In England, the only bank allowed to issue against gold coin or gold or silver bullion was the Bank of England. Different regulations were made for Scotland and Ireland, and are detailed in the chapters devoted to those countries.

The English Act is known as the Bank Charter Act, and was passed in the year 1844. It still regulates the note issue both of country banks and the Bank of England. The text is set out in Appendix A.

The Act provided for the restriction of the issues of private banks and of the Bank of England, and for the continuation of the modified monopoly of the latter bank. The chief provisions enacted that, after the passing of the Act, there were to be no new banks of issue *in any part*

of the United Kingdom; but in England a banker who, on May 6th, 1844, was lawfully issuing his own bank notes under the authority of a licence to that effect, might continue to issue notes to an average amount not exceeding his average issue as determined by the actual issue of his bank for twelve weeks before the passing of the Act. A classification of the banks of issue in existence on May 6th, 1844, will be found on page 40. A bank was to lose its right of issue by ceasing to exercise it; and if restricted by law to a membership not exceeding six, by bringing its number of members above six; and if without restriction as to the number of its members, by establishing a place of business in London or within sixty-five miles of it.

Bank of England notes were to be issued from a separate department called the Issue Department. The Issue Department might issue against public securities notes to the extent of £14,000,000, and beyond that sum might issue notes to the Banking Department in exchange for gold coin, or gold or silver bullion. If a banker ceased to issue notes, provision was made for empowering the Bank of England to increase its issue of notes against public securities by two-thirds of the amount of the discontinued issue. A specimen Bank of England return will make some of these points clearer. The following is the return made on April 6th, 1906:—

BANK OF ENGLAND RETURN.

ISSUE DEPARTMENT.

Dr.		*Cr.*	
Notes issued, . .	£53,857,300	Government Debt,	£11,015,100
		Other Securities, .	7,434,900
		Gold Coin and Bullion, . .	35,407,300
Total, . .	£53,857,300	Total, . .	£53,857,300

BANKING DEPARTMENT.

Dr.		*Cr.*	
Proprietors' Capital,	£14,553,000	Government Securities, . .	£16,112,530
Rest, . . .	3,155,321	Other Securities, .	33,553,791
Public Deposits, .	15,586,446	Notes, . . .	24,678,665
Other Deposits, .	42,750,451	Gold and Silver Coin, . . .	1,768,509
Seven Days and other Bills, .	68,277		
Total, . .	£76,113,495	Total, . .	£76,113,495

The first thing we see from this return is, that there has been a considerable increase in the issue of bank notes against securities—owing, of course, to the lapsing of the issues of other banks. The amount issued against securities has increased from £14,000,000 to £18,450,000. The amount of issue against gold coin and bullion is almost double that against securities. Of the £53,857,300 of notes actually issued from the Issue Department, notes for £24,678,655 were still in the Banking Department, and notes for £29,178,635 were actually in circulation in the country.

On three occasions since the passing of the Bank Charter Act it has been found necessary to set aside temporarily the restrictions on the issue of Bank of England notes, by allowing the bank to issue notes in excess of its authorised issue without depositing a corresponding amount of gold coin or bullion in the Issue Department. This is usually spoken of as "Suspension of the Bank Act." It was done in each case, not by fresh legislation, but by the Government of the day authorising the Bank to exceed its legal limits of issue. The years in which this was found necessary were 1847, 1857, and 1866.

The Bank Charter Act also enables any bank to draw, accept, or indorse bills of exchange, notwithstanding that they are payable at less than six months, so long as

they are not payable on demand. This last provision is more important than it at first sight appears to be, and was inserted because the Bank of England had insisted on its strict privileges, to the detriment of the London joint-stock banks. Thus, in the case of *The Bank of England* v. *Anderson* (1837, 3 Bing., N. C., 589), it appeared that the Bank of St Albans received £25 from a customer and gave him a bill for £25 drawn by them on their London agents, the London & Westminster Bank, payable twenty-one days after date. The London & Westminster Bank had sufficient funds of the Bank of St Albans to meet the bill. In an action by the Bank of England against the London & Westminster Bank, it was held that the acceptance of the bill at twenty-one days was an infringement of the privileges of the Bank of England. It was then sought to evade the privileges of the Bank of England by having such bills drawn on the managers of the London agents, under the guarantee of the London bank to pay the same. But this arrangement was held by the House of Lords to be illegal, as being a colourable evasion of the Act (*Booth* v. *Bank of England*, 1840, 6 Bing. N. C., 415). The insertion of the above section enabled the great London joint-stock banks to act as agents for country banks in the same way that a private bank could.

The Bank of England as a National Institution.—The Bank of England has always been the agent of the Government to borrow money and float loans, and it manages both the funded and unfunded debt. The first point to note is that the capital and stock of the National Debt is transferable by entry in the books of the Bank (or in the books of the Bank of Ireland), and in no other legal way. The transfer is made by the stockholder attending at the bank either in person, or by attorney,

and signing an entry in the books of the bank. No stamp duty is payable on such transfer. The requisite power of attorney must be attested by at least two witnesses. Where the transfer is not made by attorney the stockholder must be identified by a person of one of three classes, viz. (1) certain high officers of the Bank of England, (2) the past and present representatives of private banks, and (3) members of the London Stock Exchange and their clerks whose names are upon a list kept at the bank. The bank does not recognise any trust, and where stock stands in more than one name, on the death of one of the holders it takes no notice of the representatives of the deceased, but deals only with the surviving holder or holders.

If the bank transfers stock on the authority of a forged power of attorney, it must replace the amount to the credit of the rightful stockholder. But a stockbroker or other person presenting to the bank a power of attorney with a forged signature is liable, under the principle of warrant of authority, to indemnify the bank (*Starkey* v. *The Bank of England*, 1903, A. C., 114). The same principle applies where the bank transfers stock under an identification of the stockholder which turns out to have been mistaken. The stockbroker who has thus enabled a person who is not the owner of the stock to transfer it must indemnify the bank against the consequent loss (*Bank of England* v. *Cutler*, 1907, 1 K. B., 889).

Under the National Debt Act, 1870, stock certificates to bearer may be issued, but trustees may not hold them unless specially authorised by the terms of their trust.

Secondly, the bank acts as the distributor of the dividends on the National Debt. Under the provisions of the National Debt Act 1870, the money which is provided out of the Consolidated Fund for the payment of the dividends on the National Debt is to be issued to the

chief cashiers of the banks of England and Ireland for distribution to the stockholders. Under the National Debt Act, 1889, these banks, with the concurrence of the Treasury, may make regulations for the payment of dividends either by sending warrants through the post, or by payment through a banker, or by payment at a country branch of the bank. In the first case, the posting of a duly addressed dividend warrant in accordance with the regulations is made equivalent to the delivery of the warrant to the stockholder.

Thirdly, the bank places the Exchequer bonds and bills, and the Treasury bills which the Government may from time to time require to have issued.

Under the Bank Act, 1892, the Bank of England is entitled to a minimum annual remuneration for its management of the National Debt of £160,000, and the Bank of Ireland to a minimum remuneration of £8000. The bank is also entitled to £100 for every million of Exchequer bills, and £200 for every million of Treasury bills outstanding on the last day of the financial year. On the other hand, the bank makes a payment under sections 8 and 9 of the Bank Charter Act in consideration of its privilege of exclusive banking, and its exemption from stamp duties on its notes.

Incorporated Banks. — Legislation since the Bank Charter Act down to the present time has been directed towards the development of joint-stock banking. The Act of 1826, as we have seen, did not attempt to incorporate the partners of the banks formed under it. The year 1844 saw the passing of a second Banking Act, which enacted that no future partnership of more than six partners should be formed unless incorporated under the provisions of that Act. Such corporations were, by their very nature, able to sue and be sued in their own

names. Execution was to be issued against the property and effects of the Company before resort was made to the present or past shareholders, whose liability was practically the same as under the Act of 1826.

Banks with Limited Liability. — The principle of limited liability was first applied to banks in 1858, and banks were included in the general Companies Act of 1862, now part of the Companies (Consolidation) Act 1908. The provisions of that Act can only be dealt with very shortly in this volume, but it should be noticed that under that Act the liability of a past shareholder is extinguished at the end of a year from the date of his ceasing to be a member. Further, ten instead of six, a change introduced in an Act of 1857, is maintained as the maximum number of partners permissible in an unregistered banking partnership formed after the commencement of the Act. New or old companies availing themselves of the Act have the option of registering, either with or without limited liability; but, as far as the liability of an old company on its notes is concerned, no limit to its liability can be gained by registration as a limited company.

The principle of limited liability was not *per se* found to be very suitable to banking companies. Uncalled capital was always liable to be called up or to be mortgaged for the benefit of creditors other than depositors. The failure of the Glasgow Bank in 1878 attracted people's attention very forcibly to the dangerous position, both of shareholders whose liability was unlimited, and of depositors who might for years have been trusting an insolvent bank. The Companies Act 1879 was framed to give certain classes of companies (banking, insurance, and the like) a greater amount of stability, and to make further provision for the publication of the accounts of

banking companies. The corresponding provisions of the Companies (Consolidation) Act 1908 are sections 57, 58, 59, and 251. By the 57th section any company registered as unlimited may register under the Act of 1908 as limited, or any company already registered as a limited company may re-register.

Section 58 is in the following terms:—

"An unlimited company having a share capital may, by its resolution for registration as a limited company in pursuance of this Act, do either or both of the following things:—(*a*) Increase the nominal amount of its share capital by increasing the nominal amount of each of its shares; but subject to the condition that no part of the increased capital shall be capable of being called up, except in the event of and for the purposes of the company being wound up.

"(*b*) Provide that a specified portion of its uncalled share capital shall not be capable of being called up, except in the event of and for the purposes of the company being wound up."

Section 59 runs:—"A limited company may by a special resolution determine that any portion of its capital which has not been already called up shall not be capable of being called up, except in the event of and for the purposes of the company being wound up; and thereupon that portion of its share capital shall not be capable of being called up, except in the event of and for the purposes of the company being wound up."

Section 251 preserved the unlimited liability of a bank of issue in respect of notes. All the leading joint-stock banks have formed a reserve capital under these provisions.

CHAPTER III

BANKING IN SCOTLAND

THE history of banking in Scotland differs materially from that of banking in England. It has been seen that in England an unrestricted note issue led at more than one period to a severe financial crisis and the failure of many banks. This was not the case in Scotland, where freedom of note issue, during its century of existence, led to no such experiences as were undergone in England. The attitude of the people of Scotland towards its banks has two marked characteristics—one, the favour with which small bank notes long have been, and still are, regarded; the other, the widespread habit of depositing spare cash at a bank. Bank notes for less than £5 are legal in Scotland, and rather more than two-thirds of its note circulation consists of these small notes.

The Earliest Banks.—The earliest Scotch bank was the Bank of Scotland, which was established in 1695 by private persons with the object of promoting trade, and not for furthering the credit of the Government. It never has been in any sense a national institution, though its Charter was authorised by a special Act of the Scotch Parliament. It did not at first receive deposits, but issued its notes against its capital. In 1704, and again in 1715, it was obliged to suspend the

payment of its notes in specie, but it promised to pay interest on its notes until payment of the principal. This device restored public confidence, and no serious consequences ensued from the suspension of cash payment. The bank originally secured a monopoly of banking for twenty-one years; but when this expired, in 1716, it made no effort to secure its renewal.

The Royal Bank of Scotland was an outcome of the incorporation of the proprietors of the public debt. It began business in 1727 with a capital of £151,000. It was this bank which began giving "cash credits," one of the peculiar features of Scotch banking, as to which more will be said later on.

The British Linen Company was incorporated by Charter in 1746, and was originally intended to finance the linen industry, but soon drifted into general banking business, and came at last to do banking business only, but still under its original name.

These three banks still survive, and hold a place among the premier banks of Scotland. They were also in the unique position of having the privilege of limited liability in respect of both note issue and general liabilities. Their present position is as follows. The Bank of Scotland has a paid-up capital of £1,250,000, and a nominal capital issue of £1,875,000. The Royal Bank has a capital of £2,000,000, all paid up; and the British Linen Company a capital of £1,000,000, also all paid up.

Banking Legislation.—There are now in all ten banks with a right to issue bank notes in Scotland (see the table which is given below). Before this table can be properly understood, the legislation which now governs the issue of bank notes must be briefly dealt with. It has been already said that the Scotch system escaped

the financial crisis through which English banking passed. In disregard of this fact, the policy of the Bank Charter Act, 1844, was extended to Scotland by an Act of the year 1845, and the issue of bank notes in Scotland is still regulated by this Act (8 and 9 Vict. c. 38).

Roughly speaking, the principle of the Act is an application to all banks alike in Scotland of a combination of the separate regulations applied by the Bank Charter Act respectively to country banks and the Bank of England. Banks issuing notes on the 6th of May 1844 were allowed to continue their average issue as in England, and also a further issue up to the amount of gold and silver coin held by such banker at the head office or principal place of issue of such banker. This average issue, more technically known as the "authorised circulation" of the notes of a bank, is its average issue for the twelve months preceding the passing of the Act. Its actual issue has to be certified for periods of four weeks at a time (see page 45 for corresponding details of the returns to be made for English banks). Bank notes can be issued for one or more pounds without the addition of fractional parts of a pound. Scotch banks of issue may have a London office without losing their right to issue notes.

Note Issue.—The following is a return of the Scotch note circulation return for the four weeks ending the 24th day of October 1903. The first column of figures gives the "authorised circulation," which need not be covered by coin, and the other columns show the actual circulation, and the extent to which gold and silver coin is held to cover the excess of notes over the authorised issue. Under the provisions of the Scotch Act of 1845, the total in the fourth column must always

be less than the aggregate of the amounts in the first and fifth columns.

FOUR WEEKS ENDED SATURDAY, THE 24TH DAY OF OCTOBER 1903.

Name and Title as set forth in Licence.	Circulation authorised by Certificate.	Average Circulation during Four Weeks ended as above.			Average Amount of Coin held during Four Weeks ended as above.
		£5 and upwards.	Under £5.	Total.	
	£	£	£	£	£
Bank of Scotland, .	343,418	321,862	825,990	1,147,852	947,563
Royal Bank of Scotland, . . .	216,451	294,121	735,391	1,029,512	992,571
British Linen Co., .	438,024	229,811	666,244	896,055	676,608
Commercial Bank of Scotland, Ltd., .	374,880	254,216	756,745	1,010,961	796,866
National Bank of Scotland, Ltd., .	297,024	242,750	644,250	887,000	742,998
Union Bank of Scotland, Ltd., . .	454,346	300,500	736,571	1,037,071	763,466
Town and County Bank, Ltd., . .	70,133	131,378	183,929	315,307	297,199
North of Scotland Bank, Ltd., . .	154,319	195,633	259,323	454,956	341,110
Clydesdale Bank, Ltd.,	274,321	238,770	578,666	817,436	698,282
Caledonian Banking Co., Ltd., . .	53,434	60,681	78,500	139,181	104,504
	2,676,350	2,269,722	5,465,609	7,735,331	6,361,167

If we take all the banks together, we find that they held the total of £6,361,167 in coin, against notes in circulation to the amount of £5,058,981 over and above the £2,676,350 of authorised issues.

To show how little the Scotch returns fluctuate from year to year, it may be noted that for the four weeks ending November 30th, 1895, the average circulation was £7,764,561, against £7,735,331 shown above; and the average coin held, £6,329,024, against £6,361,167 shown above. These two years have been chosen for comparison at random. The total circulation of notes in Scotland for the week ending November 18th, 1905, was £7,972,327. In the spring the circulation is less than

in the autumn, and the circulation for the four weeks ending March 16th, 1906, was £6,906,103.

Formation of Banks.—It will be noted that the seven banks included in the above list, other than the three banks of whose formation a short account has been given, are all "Limited Companies." The Companies Acts apply to Scotland as well as England, so that it is not necessary to repeat what is said elsewhere about the formation of banking companies in England under the Companies Acts.

Cash Credits.—A cash credit is an arrangement by which advances are made up to a fixed limit to a customer on the security of a bond. In this bond at least two of the customer's friends join as sureties, and are known in Scotland as "cautioners."

The peculiarity of a cash credit is that the customer opens the account with the object of obtaining it. It is not a temporary overdraft permitted to a customer who is normally with a balance to his credit.

"A cash credit is therefore simply a drawing account, created in favour of a customer, upon which he may operate in precisely the same manner as on a common drawing account. The only difference being that instead of receiving interest upon the daily balance to his credit, as is very commonly the custom in Scotland,[1] he pays interest on the daily balance at his debit. It is thus an inverse drawing account." (Macleod, *Elements of Banking*, p. 159.) In practice, cash credits are given to young men in all kinds of businesses and professions, if they can find the requisite sureties. They are not usually given for less than £100; about £200 to £300 is a very usual amount; and £1000 may be taken as a maximum

[1] It is no longer the custom to allow interest on current accounts in Scotland.

except in very special cases. A ready mode of ascertaining the balance due is provided by the stipulation that a certificate of the amount due on the account, extracted from the bank books and signed by the cashier or other principal officer, shall be sufficient to constitute and ascertain the debt due under the bond. When the bond and the certificate have been registered in the appropriate registry, summary diligence may proceed on the extract received.

Advantages of the Scotch System.—"The essential features of the Scotch system of banking have been freedom of note issues, the use of small notes, and cash credits. The great achievements of the system with these elements may be summed up thus :—

"1. It has provided Scotland with an elastic currency, adapted to the condition of her industries and adequate in volume to their changing needs.

"2. It has enabled the people to carry on numerous commercial and agricultural transactions for which they could not have found the necessary quantity of coin, and has economised the locking up of capital in the precious metals.

"3. It has made the use of small denominations familiar and popular, and has taught the people the distinction between bank notes as the representatives of credit and the precious metals as the measures of value.

"4. It has brought into active use the available savings and capital of the country.

"5. It has afforded an opportunity for entering upon business to thousands of poor but honest men, and enabled them to lay the foundation of a comfortable home and in many cases of a fortune.

"6. It has convinced the people so conclusively of the value and safety of the banking currency system that no

serious panic has ever lasted beyond a few days, or has ever affected any of the banks except those which were justly the subject of distrust." (Conant, *History of Modern Banks of Issue*, p. 155.)

Bank Agents.— Branch establishments are usually worked through a special class of managers called bank agents. The powers of these agents vary according to the regulations of the particular bank for which they act; but in ordinary cases they are authorised to discount bills and do other usual business, either on their own responsibility or at least under a responsibility for a certain proportion of the discounts. It is not usual to delegate to a bank agent the power of granting cash credits. Caution or security to a large amount is required from bank agents; on the failure of the agent, apparently the money found in the desks, drawers, or boxes used for carrying on the business of the bank is the specific property of the bank, and may be reclaimed by it, although the identical notes issued by the bank may have been replaced by others. A clause empowering the bank summarily to terminate the agency, and to seize and carry off the whole notes, cash, obligations, and effects belonging to the bank, is usually inserted in the bond of caution taken by the bank from the agent.

Scotch Law.—It would be impossible in an elementary work to give an exposition of the Scotch legal system, which differs very largely from the English system, even so far as applicable to banking. In the case of certain parts of the law which have been to all intents and purposes codified for both countries by the same statutes, some of the differences between the two systems are expressed very concisely.

Thus section 53 (2) of the Bills of Exchange Act, 1882, enacts that: "In Scotland where the drawee of a bill

has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favour of the holder from the time when the bill is presented to the drawee." Section 4 (2) of the Partnership Act enacts that: "In Scotland a firm is a legal person distinct from the partners of whom it is composed, but an individual partner may be charged on a decree or diligence directed against the firm, and on payment of the debts is entitled to relief *pro ratâ* from the firm and its other members."

Some other differences will be found noted side by side with the statement of the corresponding English law.

CHAPTER IV

BANKING IN IRELAND

Before the granting of a new constitution to Ireland, in 1782, its banking business was entirely in the hands of private firms. Many of these firms were not prudently managed, and there were a series of failures in 1755, 1756, 1758, and 1760, which led to a Committee of Inquiry in 1760. But nothing of any importance was done until the passing of a Statute in 1782, granting a charter for twelve years to "the Governor and Company of the Bank of Ireland." The capital of the bank was fixed at 600,000 Irish pounds. If the bank incurred debts to a greater amount than its capital, the subscribers were answerable in their private capacity to the creditors in proportion to their subscriptions; but there was no special liability on the note issue. The charter has been extended from time to time, and the capital increased. The present capital is £2,769,231. Part of the National Debt (so far as historically attributable to Ireland) is registered and transferable in the books of the Bank of Ireland (see page 19). Cash payment of notes was suspended in Ireland between 1797 and 1821, not because such a course was necessary, but for the sake of uniformity with England. During this period the note issue increased from £621,917 to £5,182,600, but still

went on increasing after the resumption of cash payments, and reached £6,309,300 in 1825.

The charter of the Bank of Ireland had conferred upon it a monopoly of joint-stock banking by means of note issues, but had left it subject to the competition of private firms with not more than six members. In 1821, in return for permission to increase its capital, the Bank of Ireland surrendered its monopoly outside the circuit of fifty Irish miles from Dublin. In 1824 a party of English capitalists founded the Provincial Bank of Ireland, with a capital of £2,000,000, and having its head office in London. In 1825 the Northern Banking Company, originally a private firm, started business as a joint-stock company at Belfast, with a capital of £500,000, which has since been increased to £2,000,000, of which £400,000 has been paid up.

The Belfast Banking Company also grew out of an earlier private company. It started business in 1827 with a capital of £500,000, and now has a capital of £2,000,000, of which £400,000 is paid up.

The National Bank of Ireland was founded in 1835, with a subscribed capital of £1,000,000, and the Ulster Bank in 1835. This completes the list of Irish banks of issue. The Royal Bank of Ireland was founded in 1836 at Dublin, and was, therefore, unable to issue notes.

The Banking Act of 1845 (8 and 9 Vict. c. 37) follows the lines of similar legislation for England and Scotland, but more closely resembles the Scotch plan than the English. Banks already issuing notes were to have an authorised issue equal to the average issue for the twelve months preceding the passing of the Act. But an additional circulation was allowed against deposits of coin and bullion at the head office of the bank, or any four principal places of issue. Returns were to be made for

periods of four weeks, as in Scotland. If any bank of issue surrendered its issue, the Bank of Ireland was allowed to increase its issue by the full amount so withdrawn. The banks entitled to issue notes were now allowed to open offices within fifty miles of Dublin.

The circulation of bank notes in Ireland has naturally fluctuated with the population and prosperity of the country. In 1846 it was £7,266,000, but had sunk to £4,310,000 in 1849; but it has not been below £5,500,000 since 1863. There is a periodic fluctuation observable each year according to agricultural demands. The circulation is lowest in August, and then rises until a maximum is reached at the end of the year, just before rents are paid.

The following table gives the Irish note circulation for the four weeks ending September 26th, 1903:—

Name and Title as set forth in Licence.	Circulation authorised by Certificate.	Average Circulation during Four Weeks ended as above.			Average Amount of Coin held during Four Weeks ended as above.
		£5 and upwards.	Under £5.	Total.	
	£	£	£	£	£
The Bank of Ireland,	3,738,428	1,757,400	933,150	2,690,550	677,089
The Provincial Bank of Ireland, Ltd., .	927,667	485,298	307,831	793,129	342,553
The Belfast Banking Co., Ltd., . .	281,611	348,027	242,688	590,715	543,706
The Northern Banking Co., Ltd., . .	243,440	331,718	255,069	586,787	485,969
The Ulster Bank, Ltd.,	311,079	617,192	392,012	1,009,204	823,798
The National Bank, Ltd., . . .	852,269	865,086	464,171	1,329,257	829,845
	6,354,494	4,404,721	2,594,921	6,999,642	3,702,960

During the next four weeks in 1903 the circulation had increased from £6,999,642 to £7,561,989, which illustrates the periodic fluctuation already described.

The total circulation of notes in Ireland for the four

weeks ending November 18th, 1905, was £6,943,961, and for the four weeks ending March 10th, 1906, £6,170,337. It may also be noted that while notes under £5 are freely used in Ireland, they only constitute a little over one-third of the total issue against a proportion of a little over two-thirds in Scotland; and that the amount which could be legally issued against gold and bullion might be much larger if the circumstances of the country so required.

The Bankers' Acts.—There are certain Statutes of the old Irish Parliament known as the Bankers' Acts still unrepealed. The most important is 33 Geo. II. c. 14 (Ir.), called "an Act for providing a more effectual remedy for the security and payment of debts due by bankers." This Statute provides for the registration of certain conveyances made by bankers, and for the validity of settlements made by them, and other matters. The Act itself is printed in the notes to *Copland* v. *Davies* (1872, 5 E. & I., 358), and that case should be referred to for fuller information on the subject.

CHAPTER V

MONEY

THE simplest function of a banker is to receive his customer's money.

Definition.—By money is meant either metallic money or paper money. Money is sometimes called currency, because it passes freely from hand to hand or passes current. The term "money" is preferable to the term "currency," because, while persons have been found to argue that paper currency includes cheques and bills of exchange, they have never gone so far as to call cheques and bills of exchange money. Popular practice and banking customs alike regard money as consisting either of coins or bank notes. Bank notes obtained the position of money more than a century ago, for in deciding the case of *Miller* v. *Race* (1758, 1 Burr., 452) Lord Mansfield said: "Bank notes are not goods nor securities, nor documents for debts, nor are so esteemed; but are treated as money, as cash in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes. They are as much money as guineas themselves are, or any other current coin that is used in common payments as money or cash; . . . . . they are never considered as securities for money but as

money itself. On payment of them receipts are always given as for money, not as for securities or notes."

Metallic Money.—British money is coined from three different metals—gold, silver, and copper; but gold is the only standard metal. Legal coins are issued from the Mint, and from no other source. The Coinage Act, 1870, empowered the Queen in Privy Council to establish branch mints in the Colonies, and under this power large numbers of sovereigns have been and still are coined in Australia—at Sydney, Melbourne, and Perth—and are legal tender.

The coins which may be issued from the Mint are named in a schedule to the Coinage Act, which sets out the standard and minimum legal weights, and the standard of fineness. A copy of this schedule, as corrected by the Coinage Act 1891, will be found on the following page. The words "remedy allowance" refer to a provision in the Act of 1870, that "in the making of coins a remedy (or variation from the standard weight and fineness specified in the said first schedule) shall be allowed, not exceeding the amount specified in that schedule." The King in Privy Council has power to change the device and the denomination of coins. It was under this power that, in 1887, the new jubilee device was adopted and the double florin issued to the public.

Under the same Act every person has the right to have gold bullion, if of sufficient fineness, coined at the Mint, free of any charges for assaying the metal, coining it, or for waste in coinage, at the rate of £3, 17s. 10½d. per ounce of standard gold. This right does not extend to silver or copper bullion. This privilege is not of great practical importance, as the owner of the gold loses the use of it when it is being coined, and there is an alternative right conferred by the 3rd section of the

FIRST SCHEDULE TO THE COINAGE ACT.

Denomination of Coin.	Standard Weight.		Least Current Weight.		Standard Fineness.	Remedy Allowance.		
						Weight per piece.		Millesimal Fineness.
	Imperial Weight. Grains.	Metric Weight. Grams.	Imperial Weight. Grains.	Metric Weight. Grams.		Imperial Grains.	Metric Grams.	
GOLD—								
Five Pound,	616·37239	39·94028	612·50000	39·68935	Eleven-twelfths fine gold, one-twelfth alloy; or millesimal fineness 916·66.	1·00000	0·06479	0·002
Two Pound,	246·54895	15·97611	245·00000	15·87574		0·40000	0·02592	
Sovereign,	123·27447	7·98805	122·50000	7·93787		0·20000	0·01296	
Half Sovereign,	61·63723	3·99402	61·12500	3·96083		0·15000	·00972	
SILVER—								
Crown,	436·36363	28·27590	...	...	Thirty-seven-fortieths fine silver, three-fortieths alloy; or millesimal fineness 925.	2·000	·1296	0·004
Half Crown,	218·18181	14·13795	...	...		1·264	·0788	
Florin,	174·54545	11·31036	...	...		·997	·0646	
Shilling,	87·27272	5·65518	...	...		·578	·0375	
Sixpence,	43·63636	2·82759	...	...		·346	·0224	
Groat or Fourpence,	29·09090	1·88506	...	...		·262	·0170	
Threepence,	21·81818	1·41379	...	...		·212	·0138	
Twopence,	14·54545	0·94253	..	...		·144	·0093	
Penny,	7·27272	0·47126	...	...		·087	·0056	
BRONZE—								
Penny,	145·83333	9·44984	...	...	Mixed metal, copper, tin, and zinc.	2·91666	0·18899	None
Halfpenny,	87·50000	5·66990	...	...		1·75000	0·11339	
Farthing,	43·75000	2·83495	...	...		0·87500	0·05669	

The weight and fineness of the coins specified in this schedule are according to what is provided by the Act fifty-six George the Third, chapter sixty-eight, that the gold coin of the United Kingdom of Great Britain and Ireland should hold such weight and fineness as were prescribed in the then existing Mint indenture, (that is to say) that there should be nine hundred and thirty-four sovereigns and one ten shilling piece contained in twenty pounds weight troy of standard gold, of the fineness at the trial of the same of twenty-two carats of fine gold and two carats of alloy in the pound weight troy; and further, as regards silver coin, that there should be sixty-six shillings in every pound troy of standard silver of the fineness of eleven ounces two pennyweights of fine silver and eighteen pennyweights of alloy in every pound weight troy.

Bank Charter Act. Under that section every person has the right to exchange bullion, subject to the expense of melting and assaying it, at the issue department of the Bank of England for Bank of England notes, at the rate of £3, 17s. 9d. per ounce of standard gold. The bank notes can be at once exchanged for sovereigns in the issue department, while the bank can have the bullion coined at the Mint at the rate of £3, 17s. 10½d. per ounce.

As Legal Tender.—As long as coins are of the full legal weight they are a legal tender, if made of gold, up to any amount, if of silver up to forty shillings, if of copper up to a shilling.

It will be seen from the printed Schedule that a new sovereign weighs 123·27447 grains, and remains a legal tender until reduced by wear below a weight of 122·5 grains, a diminution of about three-fourths of a grain. The 7th section of the Coinage Act gives any person power to smash a light coin, but it is a matter of every-day knowledge that light coins are never smashed, and pass current for all ordinary purposes at places other than the Bank of England. In fact it was with the greatest difficulty that the Government were able to call in pre-Victorian sovereigns and half-sovereigns, which are not now legal tender, and a short Act, called the Coinage Act 1889, had eventually to be passed, which enacted that pre-Victorian gold coins would for a certain period be taken at their nominal value if there was no evidence that they had been illegally diminished in weight. If a sovereign or half-sovereign was four grains short, that fact was to be *primâ facie* evidence of such illegal treatment. In 1891 a similar Act was passed dealing with light Victorian coins. This Act made a loss of three grains in a sovereign or half-sovereign *primâ facie* evidence of such illegal treatment. It further enacted that

illegal treatment should include the defacing of a gold coin by stamping on it any name, word, device or number, whether the coin had or had not been thereby diminished or lightened.

Paper Money.—English paper money consists of bank notes. The distinguishing characteristics of English bank notes are that they are not issued by the Government, and are strictly convertible.

A bank note may be defined, for practical purposes, as an unconditional promise, written or printed on unstamped paper, made by a bank of issue to pay on demand to the bearer of the paper the sum mentioned therein, such sum not being less than £5. (In Scotland and Ireland the minimum is £1.)

It will be convenient to make four divisions of the subject, dealing with (*a*) Banks of issue, (*b*) Amount of issue, (*c*) Stamp duties, (*d*) Legal qualities of notes.

(*a*) *Banks of Issue*

The history of banks of issue, and incidentally certain aspects of their character, have already been dealt with, but here we are concerned with the whole law relating to them, as it now stands. There are three local rings, with London as centre, in which the rights of issue differ,—first, the City of London and three miles round, in which the Bank of England has a complete monopoly; secondly, the district more than three, but within sixty-five miles of London, in which the monopoly is divided between the Bank of England and banking firms of not more than six members lawfully issuing notes on May 6th, 1844;[1] lastly, the district more than sixty-five miles from London, in which the monopoly is divided between

[1] Some writers think that the effect of sec. 12 of 20 and 21 Vict. c. 49 is to raise this number to ten.

the Bank of England and private and joint-stock banks, lawfully issuing notes on May 6th, 1844 (see *Lindley on Partnership*, 7th ed., p. 110, note (*l*)).

Transmission of Right of Issue.—It seems probable that a private bank issue will ultimately cease to exist. No fresh bank can gain a right to issue notes, and the old banks often go out of existence, or lose their right of issue. At the time when the Bank Charter Act took effect, there were 72 joint-stock banks of issue, with an aggregate authorised circulation of £3,478,230, and 207 private banks of issue, with an aggregate authorised circulation of £5,153,417. In 1896 the right of issue only survived to 64 private banks and 35 joint-stock banks. In November 1902 these had shrunk to 19 private banks and 21 joint-stock banks, with an authorised issue of under two millions, and an actual issue of under one million pounds. In July 1907 the number of banks of issue was 29, their authorised issue was £1,567,580, and their actual issue was £516,792.

In the first place, a bank loses its right of issue by coming to London, as in the case of the National Provincial Bank, or if composed of more than six partners, by coming within the sixty-five mile radius. Secondly, if an issuing banker becomes bankrupt, or ceases to carry on the business of a banker, or discontinues the issue of bank notes, either by agreement with the Bank of England or otherwise, he ceases to have the right to issue notes. Again, if a bank with not more than six partners increases the number of its partners above six, it becomes unlawful for such bank to issue notes, and it is immaterial whether such bank is within or without the sixty-five mile radius. Lastly, if two banks unite so that the total number of partners exceeds six, the united bank, instead of being able to issue the aggregate amount of their previous issues,

forfeits the right to issue any notes. Subject to these rules, the right to continue to issue notes is not prejudiced or affected by any change in the personal composition of the banking company or partnership, either by the transfer of any shares or share therein, or by the admission of any new partner or member thereto, or by the retirement of any present partner or member therefrom. As the right to issue bank notes is of some value, two examples will be given, the first to show what is a permissible device for transmission of such right, and the second to show what is not a permissible device.

So long as the continuity of the firm is maintained, the right to issue notes does not lapse by changes in the membership of the firm (*Smith* v. *Everett*, 1859, 29 L. J., Ch., 236). In this case it appeared that two partners, Everett and Smith, established a bank in Salisbury in 1811. They issued notes, and under the Bank Charter Act were entitled to issue them to the extent of £15,695. By the year 1856 both partners were getting advanced in years, and in July of that year Smith died. There then survived to Everett the sole and exclusive right of issuing notes. Had he then sold the business straight out, the right of issuing notes would have disappeared. The right was, however, perpetuated by Everett giving the purchasers the benefit of his services, and allowing them to use his name for eleven months, under a very stringent indemnity against loss.

The right to issue notes cannot be transferred, directly or indirectly, from a private firm to a newly formed company under the Companies Act 1862 (*Attorney-General* v. *Birkbeck*, 1884, 12 Q. B. D., 605). Birkbeck & Co. were a private firm known as the Craven Bank, and had started business in Yorkshire in 1791, and the extent of its authorised note issue was about £60,000.

In 1880 Birkbeck & Co. transferred their business to the Craven Bank Ltd. as a going concern, with the goodwill, but with a reservation to the vendors of their right to issue their own bank notes, the benefit of which issue was to be included in the sale by the following provisions :— The notes were to be issued in the old form, *i.e.* in the name of the firm, but through the officers of the company only. The company was to pay £2 per cent. per annum interest on the amount of notes in circulation. The rights of the firm as to issue were not to be assigned, and the admission of new partners to perpetuate the right was to be made only with the consent of the company. When the business was taken over, the notes in circulation were treated as a liability which the company had to meet, and the amount of that liability was deducted from the purchase-money paid to the firm. As the outstanding notes were presented for payment they were cashed by the company ; and they were again issued by the company to persons who had to receive cash from them, and who chose to take it in that form. The firm and the company were sued for penalties under the Stamp Act for unlawfully issuing unstamped bank notes. The Court held, on the above facts, that the company had obtained the whole benefit of the privilege of issuing the notes and the sole power of issuing them, and that was in substance and truth a transfer of the privilege. As the company were not carrying on business and issuing notes on May 6th, 1844, they were contravening the Bank Charter Act. As for the firm, the Court held that, on the making of the agreement of 1880, they had ceased to carry on the business of bankers, and had become shareholders and directors of the company. As they had ceased to carry on the business of banking, by the terms of the Bank Charter Act they had lost the

right to issue bank notes. Both the company and the firm were, therefore, liable to pay the penalties sued for.

Limited Bank of Issue.—A joint-stock banking company, which was lawfully issuing in own notes on May 6th, 1844, may incorporate itself by registration under the Companies Acts either as a limited or unlimited company. But it cannot limit its liability upon its notes. The law on this point is now contained in the Companies (Consolidation) Act 1908, sec. 251, which enacts that "A bank of issue registered under this Act as a limited company shall not be entitled to limited liability in respect of its notes; and the members thereof shall be liable in respect of its notes in the same manner as if it had been registered as unlimited; but if, in the event of the company being wound up, the general assets are insufficient to satisfy the claims of both the note-holders and the general creditors, then the members, after satisfying the remaining demands of the note-holders, shall be liable to contribute towards payment of the debts of the general creditors a sum equal to the amount received by the note-holders out of the general assets of the company." Thus, if the liability to note-holders is £100,000 and to general creditors is £500,000, and the assets of the company are £150,000, its realisable uncalled capital another £150,000, the general assets will be £300,000. Out of this £300,000 there must be paid £100,000 to the note-holders, and the shareholders must then replace this £100,000. If, however, the attempt to find this further £100,000 reduces all the shareholders to bankruptcy, then the general creditors have the fund to which they looked for payment diminished by the amount of the deficiency.

(*b*) *Amount of Issue*

The Bank of England, at the time of the passing of the Bank Charter Act, had the right to issue bank notes up to the amount of £14,000,000 on the credit of securities to that value transferred to the issue department of the bank. The King in Privy Council may increase the amount which may be issued by the bank on the credit of securities to an extent not exceeding two-thirds of the amount which other bankers may have ceased to issue under other provisions of the Act. The total amount which the bank is now authorised to issue on the credit of securities is about £18,450,000. On a transfer of gold or silver bullion or gold coin from the banking to the issue department, the issue department may issue notes on the credit of such bullion or coin to an amount equal to their aggregate value. The amount of silver bullion must never exceed in value one-fourth of the gold coin and bullion. And this proportion obtains also in Scotland and Ireland with regard to the issue of notes against deposits of coin and bullion.

The maximum amount of the issue of a bank, other than the Bank of England, is the amount certified by the Commissioners of Stamps and Taxes as being the average amount of the bank notes of such bank in circulation during a period of twelve weeks preceding April 27th, 1844. To speak more strictly, the amount so certified is not a maximum, but a maximum average amount for periods of four weeks at a time. A banker has to send in weekly accounts showing the amount of his bank notes in circulation on every day of the week, and the weekly average. At the end of each successive period of four weeks there must be a further account of the average for such period. Such average is to be arrived

at by adding the totals for each business day, and dividing by the number of days. The penalty for exceeding the certified average is the amount of the excess. The Commissioners of Stamps and Taxes are empowered to cause the books of bankers, containing an account of their bank notes in circulation, to be inspected for the purpose of testing and verifying the accounts rendered. For further details the reader is referred to the Bank Charter Act, ss. 13, 17, 18, 19, and 20, printed in Appendix A, at pp. 318–320.

(*c*) *Stamp Duty and Licences*

The Bank of England has the right to issue notes without taking out a licence, and without the payment of any stamp duty or any composition in lieu thereof. (But see sections 8 and 9 of the Bank Charter Act.)

A bank of issue may issue notes either on stamped or unstamped paper, but, as a matter of practice, bank notes are always unstamped. Unstamped bank notes may be issued on obtaining a licence for that purpose from the Commissioners of Stamps, and giving a bond to secure the payment of a composition for the stamp duties which would otherwise have been payable on the notes issued. The licence is annual, bearing a £30 stamp, and expiring on the 10th October in each year. A separate licence has to be taken out for each town or place at which a bank issues notes; but as, before the Bank Charter Act, four licences were sufficient to authorise issues at any number of places, there is a proviso in that Act that bankers who were, at the date of that Act, issuing notes at more than four places under four licences, may continue to issue notes at the same places with only four licences. In other words, a banker opening a fresh branch, and issuing notes thereat, must take out a fresh

licence for such new place of issue. This is the law for Scotland also, but Irish bankers need not take out more than four licences in all. The composition is payable twice a year upon accounts delivered within the first half of January and July. These accounts are to show the amount of notes in circulation on each Saturday in the preceding half-year, with a special provision for notes that are less than seven days in circulation, and on the average circulation so found the composition has to be paid at the rate of 3s. 6d. for every one hundred pounds. The composition in Ireland is at the same rate, but in Scotland it is 4s. 2d. for every one hundred pounds.

The provisions of the Stamp Act 1891 relating to bank notes are as follows :—

"The term 'banker' means any person carrying on the business of banking in the United Kingdom.

"The term bank note includes—

"(1) Any bill of exchange or promissory note issued by any banker, other than the Bank of England, for the payment of money not exceeding one hundred pounds to the bearer on demand.

"(2) Any bill of exchange or promissory note so issued which entitles or is intended to entitle the bearer or holder thereof, without endorsement, or without any further or other endorsement than may be thereon at the time of the issuing thereof, to the payment of money not exceeding one hundred pounds on demand, whether the same be so expressed or not, and in whatever form, or by whomsoever such bill or note is drawn or made.

"A bank note issued duly stamped, or issued unstamped by a banker duly licensed or otherwise authorised to unstamped bank notes, may be from time to time re-issued without being liable to any stamp duty by reason of such re-issuing.

"If any banker, not being duly licensed or otherwise authorised to issue unstamped bank notes, issues, or causes or permits to be issued, any bank note not being duly stamped, he shall incur a fine of fifty pounds.

"If any person receives or takes in payment or as a security any bank note issued unstamped, contrary to law, knowing the same to have been so issued, he shall incur a fine of twenty pounds."

(*d*) *Legal Qualities of Bank Notes*

Tender.—A legal tender is the tendering of the exact amount of a debt in such money that the creditor puts himself in the wrong if he refuses to take the money offered. A Bank of England note, so long as the bank continues to pay gold on demand for its notes, is a legal tender in England, but not in Scotland or Ireland. But Bank of England notes may circulate in those countries, and a creditor objecting to a tender of payment must state that he refuses a tender of Bank of England notes, if that is his real reason. It is a requisite of a legal tender that the exact sum must be tendered without requiring change. It follows that a Bank of England note cannot legally be tendered in payment of a debt less than £5.

The Bank of England cannot make a legal tender of its notes in payment of its own debts.

Country notes are not, strictly speaking, a legal tender, but they become so unless, at the time of the tender, objection is made to the receipt of them on the ground that they are not cash, but only promissory notes (*Lichfield Union* v. *Greene*, 1857, 1 H. & N., 884).

If, for instance, A is owed £7, 10s. by B, but thinks he is entitled to £8. B offers A a country bank note for £5 and £2, 10s. in gold. A refuses to accept on the ground of insufficiency, but takes no objection to the

note being a country note. A then sues B for £8, and B pays £7, 10s. into Court, and pleads a legal tender of that amount. On B proving that only £7, 10s. was due, A cannot object to B's tender on the ground that a country note was tendered. A will have to pay costs from the date of B's tender.

Cutting in halves.—A bank note may be cut in halves, and the halves sent separately through the post or otherwise. In such a case there is no change of property until the second half has got into the possession of the person holding the first half (*Smith* v. *Mundy*, 1860, 29 L. J., Q. B., 172).

How different from Promissory Notes.—There are certain manifest differences between a bank note and a promissory note payable on demand not issued by a banker. Shortly they are, that bank notes issued on unstamped paper cannot be for a sum less than £5, can only be issued up to a restricted aggregate amount by any particular bank, and, lastly, are popularly treated as cash. Chiefly for the first and last reasons the common law drew a distinction between bank notes and other negotiable instruments as regards cash payments in cases of purchase and sale. The law as to English negotiable instruments in general was codified and amended in the Bills of Exchange Act 1882, but where that Act is silent the rules of the common law still apply. That Act is silent as to the presumption to be drawn from the acceptance by a creditor of a bank note, or other negotiable instrument, instead of cash, and accordingly the rules of the common law as to that presumption are still in force.

As to forged or altered bank notes, other than Bank of England notes, the Bills of Exchange Act 1882, s. 64, introduces an important change, which will be noted in its proper place.

It has been thought possible that bank notes were not intended to be touched by the Bills of Exchange Act, but though they are not anywhere specially included in the Act, the definition of a promissory note in s. 83 (1) manifestly includes them, and the proviso in favour of the Bank of England in s. 97 (3) (*c*) would be meaningless if the Act was to be construed, even without that section, so as to exclude Bank of England notes.

Practical questions as to bank notes arise in three cases —(*a*) when the issuing bank refuses to honour its own notes; (*b*) when a bank note has been lost or stolen; (*c*) when a bank note has been forged or altered.

Dishonoured Notes.—We shall consider the remedy of a holder of a dishonoured note, first against previous holders, and then against the bank issuing it.

It is quite legal to transfer a note by indorsement and delivery, as well as by delivery. In such a case a *bonâ fide* holder for value can recover the amount of the note from any indorser, and such indorser can, in his turn, recover its amount from a prior indorser. Where a note is a legal tender, the person to whom it is offered cannot oblige the person offering it to indorse it, but in all other cases (*e.g.* where he is asked to give change) he can exact indorsement as a condition upon which he will receive the note in payment.

A person who is the holder of a bank note will in ordinary cases part with it in one of four ways—he will either buy something with it, or pay a debt with it, or pay it into his banking account, or get some one to change it for him. Between the first two cases the common law draws a distinction which it does not recognise in the case of other negotiable instruments (see *Lichfield Union* v. *Greene*, 1857, 1 H. & N., 884). When a person pays for goods at the time of their purchase, or pays a

past debt by a negotiable instrument—as, for instance, by a cheque—the presumption is that the creditor takes such negotiable instrument as a payment, conditional on the instrument being honoured. If the instrument is not honoured, and the creditor has not been in fault, the debt is revived. But when goods are purchased and paid for at the time of purchase by bank notes, the seller is presumed to take upon himself the risk of the notes being dishonoured, and the purchaser is released. But the purchaser must, of course, be acting in good faith, and if he knew at the time of the purchase that the maker of the note had stopped payment, he would not be allowed to impose upon the seller (see Bills of Exchange Act 1882, s. 58 [3]). This exceptional rule as to payment by bank notes only applies to payments made at the actual time of the purchase and sale, and subsequent payments are treated as payments of past debts, aud are presumed to be only conditional. When a person pays a bank note into his banking account, it is more than probable that he will get the same form of receipt as if he had paid in coin. Nevertheless, the banker, unless he has been in fault, is not accountable for the amount of the note if afterwards dishonoured. Lastly, a person getting as a favour change for a bank note is liable to refund the value of the note on its being afterwards dishonoured, if the transferee has not been in fault.

We must now explain what is meant by being in fault. The holder of a bank note, being the holder of an instrument payable on demand, has a duty cast upon him of presenting the note for payment within a reasonable time, or within a like time of transferring it to some one else, *i.e.* of circulating it. Let us take an extreme example. A person pays his butcher's bill with a bank note on Monday, and the bank stops payment on the following

Friday. If the butcher has chosen to keep the note till Saturday the loss must fall on him, as on Tuesday he could have either paid one of his own debts with it or got cash for it from the bank. A reasonable time for presentment or circulation is not later than the day after its receipt. If there is a chance of the notes being paid by the bank, in order to charge the transferor, presentment must be made at the bank by the transferee before he tenders back the note to the transferor and asks for his money back again. Where the bank, the maker of the note, has actually stopped payment, it is not necessary to present the notes before applying to the transferor. Notice of the dishonour of a note must always be given by the transferee to the transferor within a reasonable time, that is, in general within the day after the transferee is in a position to give such notice. If this were not so the remedies of the transferee might be seriously prejudiced by delay.

The reader will now be in a position to appreciate the two actual cases given to exemplify this summary of the law. Neglect by the holder of notes to give his transferor notice of their dishonour disentitles the holder to recover their value from the transferor. (*Cammidge* v. *Allenby*, 1827, 6 B. & C., 373.) In this case it appeared that the plaintiff had sold some corn to the defendant on the morning of a Saturday in York. The defendant paid the plaintiff on the same day at three o'clock in the afternoon by certain promissory notes of the bank of D. & Son, at Huddersfield, payable to bearer on demand. D. & Son stopped payment on the same day at eleven o'clock in the morning, and never afterwards resumed their payments; but neither of the parties knew of the stoppage, or of the insolvency of D. & Son. The vendor never circulated the notes, or presented them to the bankers

for payment; but, on the following Saturday, required the vendee to take back the notes, and to pay him the amount, which the latter refused. Bayley J. said: "If the notes had been given to the plaintiff at the time when the corn was sold, he could have had no remedy upon them against the defendant. The plaintiff might have insisted upon payment in money. But if he consented to receive the notes as money, they would have been taken by him at his peril. If, indeed, he could show fraud or knowledge of the maker's insolvency in the payer, then it would be wholly immaterial whether they were taken at the time of sale or afterwards. Here the notes were given to him in payment subsequently, and the question is, whether they operate as a discharge of the debt due to the plaintiff in respect of the corn? The rule as to all negotiable instruments is, that if they are taken in payment of a pre-existing debt they operate as a discharge of that debt, unless the party who holds the instruments does all that the law requires to be done in order to obtain payment of them. Then the question is, what it was the duty of the plaintiff to do in order to obtain payment of these notes? They were intended for circulation. But I think that he was not bound *immediately* to circulate them, or to send them into the bank for payment; but he was bound, within a reasonable time after he had received them, either to circulate them or present them for payment. Now here it is conceded that if there had not been any insolvency of the bankers, the notes should have been circulated or presented for payment on Monday. It is clear that the plaintiff on that day might have had knowledge that the bankers had stopped payment, and having that knowledge, if presentment was unnecessary, he had then another duty to perform. In consequence of the negotiable nature of the

instruments, it became his duty to give notice to the party who paid him the notes that the bankers had become insolvent, and that he, the plaintiff, would resort to the defendant for payment of the notes; and it would then have been for the defendant to consider whether he could transfer the loss to any other person; for, unless he had been guilty of negligence, he might perhaps have resorted to the person who paid him the notes. That party would, however, be discharged if he received no notice of non-payment, or of the insolvency of the bankers till a week after he had paid them to the defendant. The neglect, therefore, on the part of the plaintiff to give to the defendant notice of the insolvency of the bankers may have been prejudicial to the defendant." Judgment was therefore given for the defendant.

A receipt given on deposit of bank notes as for cash does not make the bank accountable for the value of the notes if they are dishonoured and due notice of dishonour is given to the depositor. (*Timmins* v. *Gibbons*, 1852, 18 Q. B., 722.) In that case the facts and decision were as follows: M. W. deposited with a banking company £80, of which £65 was made up of country bank notes. The receipt given was as follows: "Received of M. W. £80, for which we are accountable. £80 at 3% with 14 days' notice." The company sent the notes on the same day to their agents in London, who presented them on the following day, when they were dishonoured. The agents sent them back by that evening's post to the company, who, on the following day, gave notice of dishonour to M. W. M. W. gave fourteen days' notice of withdrawal, whereupon the company tendered the notes back, and M. W. refused them. The country bank, the maker of the notes, was about five miles from the office of the company, and had stopped payment from the close

of the day on which the notes were deposited. M. W. sued the company for the £65, as being either money lent to them, or as money had and received by them. The Court held that the company, as transferees of the notes, had not been in any way in fault, and held that M. W. could not recover the sum claimed.

We may sum up these rules by saying that the transferee of a bank note, which is subsequently dishonoured, can recover the amount of the note from the transferor, provided that the transferee has not been negligent, or has not accepted the note as part of a bargain and sale of goods for cash.

The holder of a dishonoured note who wishes to proceed against the bank that issued it must present it for payment in some form or other. No particular form of demand is required by the law-merchant. In the case of a banking company it has been held that the sending in of a claim along with the note to the liquidator was a sufficient demand; and 5 per cent. interest was allowed on the claim as from such date (In re *East of England Banking Co.*, 1868, 4 Ch. Ap., 14).

A customer who is indebted to a bank, which has stopped payment of its notes, may set off against his debt any notes of the bank which are in his hands at the time at which he receives notice of an act of bankruptcy on the part of the bank, and in this way he may secure payment in full of such notes. So also, until notice of an act of bankruptcy, a customer may collect notes for the purpose of setting them off against a debt to the bank, but he cannot set off notes of which he is merely a trustee for others. Thus, where a firm, being customers of a bank with an overdrawn account, received from persons dealing with them on the day on which the bank stopped payment and the day following, but without

notice of the act of bankruptcy, certain £5 notes of the bank in part payment of antecedent debts, on the condition that they were to debit themselves with so much only as they should receive from the assignees for such notes, and also other notes for which they paid nothing, but were to pay so much only as they should receive from the assignees for such notes, it was held that the firm had a beneficial interest in the first class of notes, and were therefore entitled to set them off, but not the second class, as they held them merely as trustees for others (*Forster* v. *Wilson*, 1843, 12 M. & W., 191). Where two bankers hold each other's notes, the only debt that can be sued for is the difference of the amounts of such holdings (*Edmeads* v. *Newman*, 1823, 1 B. & C., 418).

Lost or Stolen Notes.—A bank note being a negotiable instrument, a person can, by delivery of it, give to a *bonâ fide* transferee for value a better title than he himself has. Thus, if A loses a £5 Bank of England note, which B finds and uses to pay his rent to C, if C takes the note without notice that it is a lost one, C becomes absolutely entitled to it, and A cannot recover either the note or its value from C. The same rule holds good in favour of a *bonâ fide* holder for value in the case of stolen notes. It should, however, be noticed that while a thief has no title to a note stolen by him, the innocent finder of a note is in the position of an owner as against the whole world, except the person who lost it. He can sue the maker upon it, and so also can persons deriving their title from him, even with notice of the loss. But the finder of a lost note, and all persons taking with notice of the loss, can be sued by the true owner to recover either the note or its value.

In the case of a lost note being found on private property, the owner of the property is the person entitled

to possession of the note, and not the finder (*S. Staffordshire Water Co.* v. *Sharman*, 1896, 2 Q. B., 44.) But in the case of a shop, to which the public are invited, the finder was held to be entitled as against the shopkeeper. (*Bridges* v. *Hawkesworth*, 1851, 21 L. J., Q. B., 75.) In this case a person entered a shop and found on the floor a bundle of bank notes, which had been accidentally dropped there. The finder handed them for safe custody to the shopkeeper, and, as the true owner could not be found, demanded them back. The Court held that the finder was entitled to them, and not the shopkeeper. The ground of the decision was that the notes being dropped in the public part of the shop, were never in the custody of the shopkeeper, or "within the protection of his house."

If the note is found, it has already been pointed out that the loser can sue the finder of it. If the note is not found, the loser, on giving an indemnity to the satisfaction of the Court against the claims of any other person upon the note, can sue the issuer of the note (Bills of Exchange Act, sec. 70).

Bank notes which have been stolen come within the Bills of Exchange Act 1882, s. 30 (2), which enacts that "every holder of a bill is deemed to be a holder in due course; but if, in an action on a bill, it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill." Under this enactment it has been decided that when fraud has been proved in the previous history of the note, the burden of proof is on the holder, to prove both that value has been given, and that it has

been given in good faith without notice of the fraud (*Tatam* v. *Hasler*, 1889, 23 Q. B. D., 345).

The effect of "stopping" bank notes is not to make the note valueless; it is only an intimation to the banker not to pay without full inquiry. In the case of Bank of England notes it is a means of advertising the fact that the notes have been lost or stolen, for the numbers of stopped notes are circulated from time to time amongst money-changers and other persons likely to be asked to receive them. The mere receipt of a notice to the effect that a note has been stolen does not preclude a person from saying that he took the note *bonâ fide* and for value. (*Raphael* v. *Bank of England*, 1855, 25 L. J., C. P., 33.) In this case it was shown that Raphael's principal, a Paris money-changer, had about April 1853 received notice of a robbery of Bank of England notes, and that he had placed the notice on a file. In June 1854 he cashed for a stranger a £500 note, one of the stolen notes. The jury found that when the money-changer took the note he had the means of knowing it had been stolen if he had taken proper care of the notices actually delivered to him, but that he had actually no notice or knowledge to that effect at the time he took it. On that finding the Court held that Raphael was entitled to recover the amount of the note.

Forged or Altered Notes.—A forged note is a piece of waste paper, so far as value is concerned. A transferor, by delivery of a note, warrants to his immediate transferee, being a holder for value, that the note is what it purports to be (Bills of Exchange Act 1882, s. 58 (3)). Therefore, if A delivers to B a forged note, B can recover from A what he may have paid him for the note. At common law a material alteration in a bank note, without the assent of the issuing bank, made the instrument

void and worthless. Under this rule it was decided, in the case of *Suffell* v. *Bank of England* (1882, 9 Q. B. D., 555), that a Bank of England note, the number of which had been altered so that it could not be identified as a stolen note, was materially altered and valueless. The Bills of Exchange Act 1882, s. 64, adopted the rule of the common law, but added a proviso that "where a bill (which includes promissory notes) has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor." Thus, a country bank note for £5, altered so cleverly as to read for £50, could be enforced by a *bonâ fide* holder for value to the extent of £5. It has been held that Bank of England notes are not within this proviso (*Leeds Bank* v. *Walker*, 1883, 11 Q. B. D., 84). If this were not so, a mere alteration of the number of a Bank of England note, if not apparent, would not make it worthless. Various reasons for this decision were given, but perhaps the least forced is the fact that nothing in the Act is to affect the statutory privileges of the Bank of England.

CHAPTER VI

BANKS AND BANKING COMPANIES

Composition of Banks.—A bank may be composed of a single person, or of several persons in partnership, or of a company.

Clergymen.—By various Church Discipline Acts, clergymen are forbidden to trade, or to be managing partners or directors of companies, but as these Acts do not invalidate either the contracts made by clergymen, or make illegal the companies to which they may act as managers or directors, only their ecclesiastical superiors, and not the general public, are concerned with them.

Registration and Publication of Partners' Names.—The 21st section of the Bank Charter Act applies to all bankers. It enacts that every banker shall, on the 1st day of January in each year, or within fifteen days thereafter, make a return to the Commissioners of Stamps and Taxes, at their head office in London, of his name, residence, and occupation; or, in the case of a company or partnership, of the name, residence, and occupation of every person composing or being a member of such company or partnership; and also the name of the firm under which each banker, company, or partnership carry on the business of banking, and of every place where such business is carried on. The penalty for non-compliance with this enactment, or for wilful mis-statements, is £50.

Banks making similar returns under the Companies Act 1862 are now exempt from making this return.

The Commissioners must, on or before the 1st day of March in every year, publish in some newspaper circulating within each town or county respectively a copy of the return so made by every banker carrying on business within such town or county.

Partnerships.—As has been said in Chapter II, up to the year 1857 no ordinary partnership of more than six partners could be formed to carry on the business of banking. But, under the special provisions of various Acts of Parliament, a number greater than six could unite as a modified partnership or company. In that year the limit was raised to ten, at which figure it has since remained. The present law on this point is contained in the Companies (Consolidation) Act 1908, sec. 1, which enacts that no company, association, or partnership, consisting of more than ten persons, shall be formed for the purpose of carrying on the business of banking, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters-patent. Every partnership is now governed by its partnership articles (if any), and the Partnership Act 1890.[1]

The scope of this book does not cover any general exposition of partnership law, but the cases on the liability of one banking partner for the acts of another, and on the position of retired partners, which are both very practical points, are not likely to be understood without some preliminary explanation.

As a rule, each partner of a firm transacts business for the firm without getting the consent of the other partners to each separate act. Sometimes one of the partners is

[1] For limited partnerships under the Limited Partnerships Act 1907, *see infra.*

a sleeping or dormant partner, and takes no active part in the management of the business. But in any case a partner may be constantly doing acts or entering into engagements which are, in fact, unauthorised by his co-partners; and the question arises, to what extent are the co-partners liable?

Section 5 of the Partnership Act enacts that "every partner is an agent of the firm, and his other partners, *for the purpose of the business of the partnership*," and proceeds to enact, with certain exceptions which need not be noticed here, that "the acts of every partner who does any act for *carrying on in the usual way* business of the kind carried on by the firm of which he is a member, bind the firm and his partners."

The words in italics afford the important criteria—Was the partner acting for the purpose of the business of the firm, and was he carrying on the business in the usual way?

The same principle applies to wrongs done by a partner. Section 10 of the Partnership Act enacts that "where by any wrongful act or omission of any partner *acting in the ordinary course of the business of the firm*, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act."

Thus, where a customer deposited two Exchequer bills with the firm, and these were sold by the acting partners without the customer's authority, it was held that the amount of money received on their sale became a partnership debt, whether the individual partners were or were not privy to the sale (*Devaynes* v. *Noble, Clayton's case*, 1816, 1 Mer., at pp. 572, 579). Bankers often invest money for their customers on their express instructions,

but it is not part of their business to find investments for their customers, and a partner so doing is not acting in the ordinary course of the business of the firm. "It is said that it is the practice of bankers generally to invest the money of their customers for them. But it is notorious that their practice is not to act for their customers as money scriveners or agents generally, to find investments for their money, but if a customer sends them, with a power of attorney, a letter of instructions directing them to sell a particular sum of stock, they will do so; or if the customer wishes a particular investment in the funds, and directs them to lay out his money in the purchase of a particular stock, and debit him with the amount, they will do so; and when they do, be it observed, they do so ordinarily without a cheque, but on a particular letter of instructions. But how does that practice apply to this case? It is not within the scope of the business of bankers to seek or make investments generally for their customers" (*Bishop* v. *Countess of Jersey*, 1854, 23 L. J., Ch., 483). Accordingly, if a partner in a bank is asked by a customer to invest a particular sum on a specific security, and does not do so, but applies the money to his own use, the other partners, though they receive none of the money, and know nothing of the transaction, will be liable to replace it. (Cf. *Blair* v. *Bromley*, 1847, 2 Ph., 354.) If, however, the partner had merely been asked to invest the money, without express directions as to the security to be purchased, the other partners would not be liable. (Cf. *Harman* v. *Johnson*, 1853, 2 E. & B., 61.)

Changes in the partnership firm are sometimes apt to give rise to legal difficulties. A partner retires, but while the remaining partners carry on the bank smoothly the customers are satisfied. Then suddenly the bank

gets into difficulties, and the customers desire to get at the estate of the retired partner. The 17th section of the Partnership Act 1890 enacts that "a partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement," and "a retiring partner may be discharged from any existing liabilities by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing beween the creditors and the firm as newly constituted." The acceptance by the creditor of the liability of the new firm in the place of the liability of the old firm is technically known as a novation of the debt. The mere giving of a fresh deposit note to a customer who withdraws part of his deposit is not a novation of the original debt (In re *Head*, 1893, 3 Ch., 426). The following is part of the judgment in that case. "The question I have to decide is one of novation. It appears that Mrs Reynolds, one of the customers of the Edenbridge Bank, left £1400 on deposit with the original firm of G. & G. S. Head, for which she received a deposit note in the usual form. After the death of George Head in December 1878 the business of the bank was carried on by G. S. Head alone. Mrs Reynolds was aware of this fact, and on several subsequent occasions she seems to have withdrawn some of her money, and on one of them, viz. 14th December 1891, receiving a fresh deposit note for the balance of £850, in precisely similar terms with her old deposit note, except that the amount due was £850 instead of £1400. On this it has been argued that there has been a novation, or, in other words, that there has been an agreement on the part of Mrs Reynolds to discharge her original debtor, G. Head, and accept the

liability of G. S. Head alone in substitution for the joint liability of G. & G. S. Head. The giving of a fresh deposit note to a customer who withdraws any part of his deposit seems to have been only a convenient and very usual way of writing off a part of the debt due from the bank, but it is not sufficient evidence of novation to discharge the original debtor from liability. In my opinion there never was any intention on the part of Mrs Reynolds to get rid of or discharge her original debtor, and accept the liability of the son alone. The result therefore is, that her claim to prove against the estate of the deceased partner G. Head for that £850 balance must be allowed." But when one of the customers closed his current account and had the balance to his credit carried to a new deposit account, it was held that there had been a novation of the original debt (In re *Head, Head* v. *Head*, No. 2, 1894, 2 Ch., 236). But the new firm will have the benefit of the rule in Clayton's case (see p. 122).

"A, B, and C are bankers in partnership. A dies and B and C continue the business. D, E, and F, customers of the bank at the time of A's death, continue to deal with the bank in the usual way after they know of A's death. The firm afterwards becomes insolvent. A's estate remains liable to D, E, and F for the balances due to them respectively at the time of A's death, less any sums subsequently drawn out." (Pollock on Partnership, as a deduction from Clayton's case, 1816; 1 Merivale, 572).

Limited Partnerships. — On 1st January 1908 the Limited Partnerships Act 1907 comes into force. There is no legal reason why private banks should not avail themselves of the Act, though most probably commercial reasons will be against such a course of action. In the

case of banking, the limit of ten partners is retained as the legal maximum (section 4 (2)). In these new partnerships partners will fall into two classes: (*a*) general partners, who have an unlimited liability for the partnership debts, and who alone can take part in the management of the partnership business and bind the firm; and (*b*) limited partners who contribute to the assets of the firm a sum or sums as capital or property valued at a stated amount, who are not liable for the debts and obligations of the firm beyond the amount so contributed, and who may not take part in the management of the partnership business. As limited partnerships are much more likely to be customers of banks than bankers, it will be more convenient to discuss their legal characteristics when we are dealing with special customers in Chapter XIV.

Companies.—The number of possible combinations of partnerships and companies formed under the Acts of 1826 and 1844, and modified under some later Act, is very large and embarrassing. As, however, a sketch of both these Acts has already been given, and a very large number of companies have registered themselves under the Companies Acts since the Act of 1879, it will be sufficient if we merely consider companies registered under the Companies Acts. These may be divided into two classes,—companies formed before 1862, and since registered under either the Act of 1862 or the Act of 1908, and companies formed since 1862.

Companies formed before the Act of 1862.—Companies formed before 1862, and since registered under the Companies Acts, have, instead of memorandum and articles of association, their original deed of settlement or other similar document for the conditions and regulations of the company. (A deed of settlement was the document

executed by the members of a joint-stock company at its formation, declaring the objects and mode of government of the company.) Table A does not apply to such a company. The company may not alter any provision contained in any Act of Parliament relating to it, nor, without the sanction of the Board of Trade, may it alter any provision contained in any letters-patent relating to the company. There is a section dealing with debts and liabilities contracted before registration, and for these both members and past members continue liable, in the same way as if there had been no registration of the company. As to such liabilities, past members do not become exempt after having ceased for a year to be members. Such part of the deed of settlement, or other document, as would have been put into the memorandum of association if the company had been formed under the Companies Acts, is unalterable, except that under the Companies (Consolidation) Act 1908, sec. 264, a company may alter the form of its constitution by substituting a memorandum and articles of association for a deed of settlement, with or without an alteration of its objects, but subject in any case to confirmation by the Court (see p. 77). If the company desires to register as a limited company it must, by section 256 of that Act, give at least thirty days' previous notice to its customers.

Companies formed since the Act of 1862.—The general features of a company formed and registered under the Companies Acts are too well known to be dwelt on here, and the special features, other than those directly concerning banking companies, must be looked for on books on companies. The following sections, as directly affecting all companies coming under these Acts, must, however, be noticed. In the Act of 1908, s. 1 prescribes a limit of ten for partnerships formed after the com-

mencement of the Act. S. 26 requires an annual list of members, with detailed accounts of the capital, to be forwarded to the Registrar of Joint-Stock Companies; and if this section is complied with, there need be no return under the Bank Charter Act. S. 108 is an important section applying to limited banking companies. Each such company must, on the first Monday in February and the first Tuesday in August in every year during which it carries on business, make a statement in the form marked C in the first schedule to the Act, or as near thereto as circumstances will admit; and a copy of such statement is to be put up in a conspicuous place in the registered office of the company, and in every branch office or place where the business of the company is carried on. Every company required to forward to the registrar a summary under s. 26 of the Act of 1908 shall include in that summary a statement, made up to such date as may be specified in the statement, in the form of a balance-sheet, audited by the Company's auditors, and containing a summary of its capital, its liabilities, and its assets, giving such particulars as will disclose the general nature of such liabilities and assets, and how the values of the fixed assets have been arrived at, but the balance-sheet need not include a statement of profit and loss. This provision does not apply to a "private company," but few, if any, banking companies come within this exception.

Companies Act 1879.—As has been already said, the Companies Act 1879 was the Act which induced practically all the leading joint-stock banking companies of the country to register as limited companies, and to strengthen their position by the establishment of a reserve capital. This has been dealt with on pp. 22–3.

Registration of an Unlimited Company as a Limited

Company.—This is now provided for by sections 252 and 256 of the Companies (Consolidation) Act 1908.

An unlimited banking company, if consisting of seven or more members, may register itself as a limited company on passing a resolution to that effect at a general meeting by a three-fourths majority.

Before registration there must be delivered to the Registrar of Joint-Stock Companies—

(1) A list of the members of the company.

(2) A copy of the Act of Parliament, Royal Charter, deed of settlement, or other instrument constituting or regulating the company.

(3) The usual particulars as to nominal capital and name of the company ordinarily given in a memorandum of association;[1] and besides these, the number of shares taken by the members, and the amount paid on each share.

The banking company must give notice of its intention to register as a limited company to each of its customers, and in default of notice to any particular customer, the company's liability as regards such customer remains unlimited.

The word "limited" must thereafter appear as part of the company's title.

Audit of Accounts.—Provisions as to audit were contained in the Companies Act 1879, and these were amplified in the Acts of 1900 and 1907. The provisions now in force are contained in sections 112 and 113 of the Companies (Consolidation) Act 1908, the main portions of which run as follows:—

Sec. 112.—"(1) Every company shall at each annual general meeting appoint an auditor or auditors to hold office until the next annual general meeting.

"(2) If an appointment of auditors is not made at

[1] For a form of memorandum of association, see Appendix C.

an annual general meeting, the Board of Trade may, on the application of any member of the company, appoint an auditor of the company for the current year, and fix the remuneration to be paid to him by the company for his services.

"(3) A director or officer of the company shall not be capable of being appointed auditor of the company."

Sec. 113.—"(1) Every auditor of a company shall have a right of access at all times to the books and accounts and vouchers of the company, and shall be entitled to require from the directors or officers of the company such information and explanation as may be necessary for the performance of the duties of the auditors.

"(2) The auditors shall make a report to the shareholders on the accounts examined by them, and on every balance-sheet laid before the company in general meeting during their tenure of office, and the report shall state—

"(*a*) Whether or not they have obtained all the information and explanations they have required; and

"(*b*) Whether, in their opinion, the balance-sheet referred to in the report is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them, and as shown by the books of the company.

"(3) The balance-sheet shall be signed on behalf of the Board by two of the directors of the company or, if there is only one director, by that director, and the auditors' report shall be attached to the balance-sheet, or there shall be inserted at the foot of the balance-sheet a reference to the report, and the report shall be read before the company in general meeting, and shall be open to inspection by any shareholder. Any shareholder

shall be entitled to be furnished with a copy of the balance-sheet or auditors' report at a charge not exceeding sixpence for every hundred words.

"(4) If any copy of a balance-sheet which has not been signed as required by this section is issued, circulated, or published, or if any copy of a balance-sheet is issued, circulated, or published without either having a copy of the auditors' report attached thereto or containing such reference to that report as is required by this section, the company, and every director, manager, secretary, or other officer of the company who is knowingly a party to the default, shall on conviction be liable to a fine not exceeding £50.

"(5) In the case of a banking company registered after the 15th August 1879—

(*a*) If the company has branch banks beyond the limits of Europe, it shall be sufficient if the auditor is allowed access to such copies of and extracts from the books and accounts of any such branch as have been transmitted to the head office of the company in the United Kingdom; and

(*b*) The balance-sheet must be signed by the secretary or the manager (if any), and where there are more than three directors of the company by at least three of those directors, and where there are not more than three directors by all the directors."

Amalgamation of Companies.—Important questions of novation arise when one company amalgamates with another. Mr Justice Buckley, in his work on Company Law, considers that in a case of amalgamation more cogent evidence of novation is required than when a partnership takes in a new partner. He then proceeds (8th ed., p. 424):—"As a general rule, where, upon the amalgamation of two companies, notice of the fact is

given to a creditor of the old company, and in substance notice is given to him that he may elect whether he will take the liability of the new company in lieu of that of the original company or not, and then, although he do not by an express agreement assent to the novation, yet if he acts upon it, and takes the benefits which he could only be entitled to upon the assumption that he has assented to it, there will be evidence on which the Court may find, and, unless there is something to contradict it, ought to find, that he has agreed to take the liability of the new company in substitution for that of the old one."

Purchase of Shares.—A person may become a member of a banking company by a purchase of shares and registration as a shareholder. A person ceases to be a member as soon as his name is rightfully removed from the register, but if he was a holder of shares which are not fully paid (and banking shares are very seldom fully paid), and the company goes into liquidation within a year of such removal, he can be made liable for calls if his transferee cannot pay them.

In order to prevent speculation in bank shares an Act was passed in the year 1879, generally known as Leeman's Act, which enacted that no contract for the purchase or sale of bank shares should be valid unless it contained the numbers distinguishing the shares. The object of this Act was to make it impossible to sell bank shares of which one was not the owner. But as the rules of the Stock Exchange disregard the Act, it has not been of much use.

Chartered Banks.—One way of obtaining incorporation is by the grant of a charter from the Crown. But the Crown, in exercising its powers, can only create corporations with the ordinary incidents attached to them by the common law; and by the common law the only

property liable for the debts of a corporation is the property of the corporation, as distinct from that of its members. This extremely limited liability was not at all in favour with regard to trading companies in England, and, with a few notable exceptions, chartered companies for trading purposes were not created in England. The Bank of England was created by charter, but under the authority of an Act of Parliament of the year 1694 (p. 9), and the Bank of Scotland also had its original charter authorised by an Act of Parliament (p. 24). The British Linen Company furnishes an example of a charter granted by the Crown under its ordinary prerogative. But all these bank charters were framed, as regards the liability of the members, on the ordinary lines as to corporate liability, and this explains why the liability on their bank notes was not an unlimited liability. A good many Colonial banks are also chartered banks, but under an Act of the year 1825 the Crown has power to make the individual shareholders, as well as the corporate property, liable for the debts of the corporation.

In the matter of regulation, a company incorporated by charter does not differ materially from one incorporated under the Companies Acts. The charter defines its powers, and lays down regulations for its working, very much on the same lines as is done by the memorandum and articles of association of an ordinary joint-stock company.

CHAPTER VII

POWERS OF A BANK AND ITS OFFICERS

If a bank is formed by a partnership, it is possible for the partners to conduct the business in any way they think fit, and at any time, by agreement among themselves, to alter the nature or scope of the business. It is not so in the case of a company. The powers of a company are those powers, and those only, which are necessary for carrying out its objects, as expressed by its deed of settlement, or, in the case of a company formed under the Companies Act, by its memorandum of association. To take a very simple example: a banking company formed with the object of carrying on the business of banking in England only could not open branch banks in Canada. It is usual, in the object clause of a memorandum of association, not to do more than refer to the business of banking in general terms, or at any rate not to enerumate exhaustively every act which a bank may from time to time find it expedient to perform. Under such a clause powers will be implied sufficient for carrying on the banking business as efficiently as if it were an ordinary partnership. Thus it has been said that, "where there are directors of a trading company, those directors necessarily have incidentally the power of doing that which is ordinarily and reasonably done in every such business,

with a view of getting either better work from their servants, or with a view to attract customers to them." Under this principle it has been held that a banking company was acting within its powers in paying a half-yearly pension for five years for the benefit of the family of a deceased manager of the bank, although they had no express power to do such a thing (*Henderson* v. *Bank of Australasia*, 1888, 40 Ch. D., 170).

On the same principle it has been said that it is within the ordinary scope of banking business to borrow money on emergency, and therefore, when banking business is an object of the company, no special power to borrow need be inserted. "The nature of a banker's business, especially if the bank be one both of issue and deposit, necessarily exposes him to sudden and immediate demands, which may be to the extent of a large proportion of his debts, while his profits are to be made in employing his own moneys and those entrusted to him in discounting bills, in loans, and other modes of investment. It is impossible that he should always have his assets in such a state as to be applicable immediately to the payment of all demands which may be made upon him; and if a partner has no power, under such circumstances, to borrow money for the partnership, either the assent of each individual member must be obtained, which may be often impracticable, or the concern must be ruined. We have no doubt at all, therefore, that in ordinary banking partnerships such power exists, and that the directors, by the terms of their appointment, had all the general powers, and among the rest the power of borrowing, unless such power is excluded by other provisions of the deed." (Quoted from *Bank of Australasia* v. *Breillat*, 1847, 6 Moore, P. C., 152, at p. 104 in *Maclae* v. *Sutherland*, 1854, 3 E. & B., 1.)

Part of the ordinary business of a bank is to lend money or permit overdrafts upon security, and if a banking company has power to do this, it has power to do all reasonable acts necessary for making its securities valid and effective. In the course of such acts the bank may acquire liabilities which it would be *ultra vires* for it to acquire for purposes other than the realisation of its security. Thus it may become a shareholder in another company, or liable on a building contract, or as a shipowner, or in respect of matters of freight, or of any matters connected with a bill of lading which the bank holds as security. When bankers have thus acquired such liabilities, they cannot afterwards turn round and say that what they did was *ultra vires*.

But though a company will be allowed as full powers as a partnership, so far as relates to the carrying out of objects within the scope of its business, a company stands on an altogether different footing as regards an extension of the scope of its business. Until the passing of the Companies (Memorandum of Association) Act 1890, it was impossible for a company under the Companies Acts to alter the object clause of its memorandum of association, though it could alter the provisions as to capital. Fresh powers could only be obtained by reconstruction. Now it is possible to alter a memorandum within certain limits if the sanction of the Court has been duly obtained. The sanction of the Court may be given if the alteration is required to enable the company —(*a*) to carry on its business more economically or more efficiently; (*b*) to attain its main purpose by new or improved means; (*c*) to enlarge or change the local area of its operations; (*d*) to carry on some business which, under existing circumstances, may conveniently or advantageously be combined with the business of the

company; (*e*) to restrict or abandon any of the objects specified in the memorandum (Companies (Consolidation) Act 1908, sec. 9).

Powers and Duties of Directors.—The directors of a company cannot have greater powers than the company itself has, and any ratification of an act of the directors, which would have been *ultra vires* of the company, is useless and of no effect. On the other hand, if the directors exceed their authority, but keep within the powers of the company, the latter can ratify and adopt their act. It is usual for all the business powers of a banking company to be confided to the directors, and then the powers of the company and the powers of the directors are the same.

The actual work of the bank will be done by the managers and the staff of clerks acting under them. The directors are entitled to leave many matters in their hands, and to rely on their judgment, information, and advice. Thus a director of a joint-stock banking company who assented to the payment of dividends out of capital, and to advances on improper security, but in so doing honestly relied on the judgment, information, and advice of the chairman and general manager of the bank, by whose statements he was misled, and whose integrity, skill, and competence he had no reason for suspecting, was held not to have been negligent of his duties as director, and not to be liable, in the winding-up, to replace the dividends so declared, or to repay the losses so incurred (*Dovey* v. *Cory*, 1901, A. C., 477). Lord Davey laid it down in that case that directors were not liable for not examining entries in the company's books.

Where the collapse of a bank was due to overdrafts which the cashier, the principal executive officer of the bank under the directors, had irregularly and improperly

allowed to certain customers, the president of the bank was not held guilty of negligence simply by reason of his having in good faith failed to detect the cashier's concealment of such overdrafts (*Prefontaine* v. *Grenier*, 1907, A. C., 101).

It has been held that the directors of a company, with extensive powers of carrying on a banking business, are not acting *ultra vires* in guaranteeing the payment of interest on the debentures of a limited company issued for the purpose of forming such company, provided that the establishment of the company was of importance to the bank (In re *West of England Bank*, 1880, 14 Ch. D., 317).

As to the general liability of directors for negligence, the following rule is laid down in Buckley on Companies (8th ed., p. 563). "A director is liable for negligence in performing his duties, but there is no case, it is believed, in which directors have been held answerable for losses sustained by their mere innocent mistake, nor unless that mistake has been accompanied by some fraudulent or at least suspicious conduct or motive."

The directors of a banking company, being agents, are bound not to place themselves in a position where their interests and duties conflict. Any profit made out of an abuse of their position must be handed over to the company. In other words, no agent in the course of his agency, and in the matter of his agency, can be allowed to make any profit without the knowledge and consent of his principal. Thus, where new shares were allotted to a person who found that he could not take them all up, and, before his contract of purchase was complete, and while it was the duty of the directors to see that such contract was duly performed by him, applied to the directors to relieve him of some of them, and they severally took from him considerable numbers, which

they afterwards sold at a profit, it was held that each director must account to the bank from his profits. L.-J. Mellish said: "The main question is, how far a trustee or agent for sale is precluded from purchasing from his own purchaser the property which he is entrusted to sell. As long as the contract remains executory, and the trustee or agent has power either to enforce it or to rescind or alter it,—as long as it remains in that state he cannot repurchase the property from his own purchaser, except for the benefit of his principal" (*Parker* v. *M'Kenna*, 1874, 10 Ch. Ap., 96).

Manager.—The manager of a bank or a branch of it is the general agent of the company or the partners for carrying on the business of the bank. As to all acts within the ordinary scope of the banking business done by a manager the bank stands in the manager's shoes, whether the bank is suing or being sued.

Any restriction which, by agreement between the principals and their agent, is attempted to be imposed upon the authority of the general agent, is operative only between the principals and the agent, and does not limit his authority as regards third persons, who acquire rights by its exercise, unless they know that such restriction has been made.

Story on Agency expresses this rule thus: "The principal is liable to third persons in a civil suit for frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances, and omissions of duty of his agent in the course of his employment, although the principal did not authorise, or justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts, or disapproved of them."

When a manager proceeds to do an act outside the

ordinary scope of banking business, a different set of considerations comes into play. A customer dealing with the manager has no right to presume that the manager has any extraordinary authority. Accordingly, if a customer suffers damage through the wrongdoing or negligence of the manager in such a matter, he can only recover damages against the bank on proof that the bank had expressly authorised the manager to do the act complained of, or had subsequently adopted such act for its own use and benefit. Illustrations of the practical effect of these principles are now given.

Payment of Money.—If money is paid to the manager of a bank as such, the customer can demand it of the bankers, although the money may never have come into the hands of the bankers. (*Thompson* v. *Bell*, 1854, 10 Ex., 10.) In this case Mrs Thompson kept a deposit account at the Southampton branch of the National Provincial Bank of England. The manager of the bank advised her to purchase some houses for £595, on which the bank had an equitable mortgage. The manager received her deposit notes, gave a receipt for the £595 in his own name, and a fresh deposit note for the balance. He afterwards absconded with £595. Mrs Thompson's husband sued the bank for a return of his money. The jury found that the manager intended to make Mrs Thompson believe, and that she did believe, that the manager was acting in this transaction as agent for the bank. The Court held that the plaintiff could recover, on the ground that the money was still in the bank. "The manager of a bank is a person appointed to conduct the entire business irrespective of the partners; and in this case the manager undoubtedly received the money in the first instance from the plaintiff's wife, and gave her a deposit receipt. He then represents to her that

some benefit would accrue by her investing that money in a different way. She listens to his suggestion and draws out the money, which she hands over to him, as manager of the bank, to be disposed of in the way suggested. That he does not do, therefore the money is still in the hands of the bank."

Illusory Guarantee.—Where a manager gives a guarantee, and conceals a particular fact which he knows will make the guarantee of no value, the bank is liable for the manager's fraudulent conduct. (*Barwick* v. *London Joint-Stock Bank*, 1867, 2 Ex., 259.) In that case the facts were as follows. Barwick had for some time supplied Davis with oats on credit for carrying out a Government contract. This he did under some sort of a guarantee from the London Joint-Stock Bank. Barwick refused to supply further oats except on a better guarantee. Thereupon the bank manager gave a written guarantee to the effect that Davis's cheque on the bank, in favour of Barwick, in payment for oats supplied, should be paid on receipt of the Government money, in priority to any other payment "except to this bank." Davis was then indebted to the bank to the amount of £12,000, but this fact was not known to Barwick, nor was it communicated to him by the manager. Barwick supplied oats to the value of £1227; the Government money, £2676, was received by Davis and paid into the bank; but Davis's cheque in favour of Barwick was dishonoured by the bank, who claimed to retain the £2676 in payment of Davis's debt to them. The Court held that there was evidence to go to the jury that the manager knew and intended that the guarantee should be unavailing, and fraudulently concealed from Barwick the fact that would make it so, and that for such fraud in their manager the bank would be liable.

Representation of Solvency.—It is usual for bankers to make and answer inquiries as to the solvency and responsibility of customers. It is not usual to answer inquiries made by private persons, and therefore an inquiry addressed by bank A to bank B is presumably liable to be communicated to some customer of bank A, for whom it may have been made. If, therefore, bank B makes a false answer to the inquiry of bank A, which is communicated to the customer of bank A, that customer may sue for damages suffered through his acting on the false representation. But where the false representation is made by a manager, then the provisions of Lord Tenterden's Act apply, and the manager alone is liable. Section 6 of Lord Tenterden's Act (9 Geo. IV. c. 14) enacts that "no action shall be brought whereby to charge any person upon, or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon it, unless such representation or assurance be made in writing, signed by the party to be charged therewith."

In the case of *Swift* v. *Jewsbury* (1874, 9 Q. B., 301), it appeared that Swift was asked to sell about £3000 worth of iron to Russell, and was referred to the Cheltenham branch of the Gloucestershire Bank. Swift was a customer of an unincorporated joint-stock Sheffield bank, whose manager inquired, at Swift's request, of the manager of the Cheltenham branch as to Russell's monetary worth. The manager sent a reply which was false to his knowledge. Swift acted upon that, and eventually lost his money through the insolvency of Russell. On appeal, the following decisions were given: (1) that the manager was liable personally for the false representation; (2)

that, under the section of Lord Tenterden's Act just quoted, the false representation must be signed by the person making it, and not by an agent, and that, therefore, if the manager was considered an agent, the banking company was not liable; and (3) that the signature of the manager to the latter could not be considered the signature of the banking company itself.

It has been similarly held that an incorporated banking company is, under the terms of Lord Tenterden s Act, not liable for a false representation of the kind contemplated by section 6, made in a letter written and signed by its agent (*Hirst* v. *West Riding Union Banking Coy. Ld.*, 1901, 2 K. B., 560).

Fraud.—Where the manager paid a private debt out of the bank funds, and took from the payee what the payee thought was a receipt but was really a cheque, the bank was not allowed to recover the amount of the cheque (*Foster* v. *Green*, 1862, 31 L. J., Ex., 168.) So where the manager of a branch bank advances the bank's money, with knowledge that the borrower is obtaining the money for the sole purpose of misapplying it, the bank acquires no better title than the manager or the customer (*Collinson* v. *Lister*, 1855, 7 De G., M. & G., 634).

Arrests and Prosecutions.—It has been laid down that the arrest, and still less the prosecution, of offenders is not within the ordinary routine of banking business, and when the question of a manager's authority in such a case arises, it is essential to inquire carefully into his position and duties. These may, and in practice do, vary considerably. In the case of a chief or general manager, invested with general supervision and power of control, such an authority in certain cases affecting the property of the bank might be presumed from his position to

belong to him, at least in the absence of directors. The same presumption might arise in the instance of a manager conducting the business of a branch bank at a distance from the head office and the board of directors. The necessary authority may be general, or it may be special and derived from the exigency of the particular occasion on which it is exercised. In the former case it is enough to show that the agent was acting in what he did on behalf of the principal; but in the latter case evidence must be given of a state of facts which shows that such exigency is present, or from which it might reasonably be supposed to be present (*Bank of New South Wales* v. *Owston*, 1879, 4 Ap. Ca., 270).

Liability of Manager to Bank.—A manager is not liable to his employers for the results of his acts unless he exceeds the power and authority with which he is entrusted, or unless, while acting within the scope of his authority, he makes an abuse of his position to gain a private advantage at the expense of the bank.

Accounting for Profits.—The principles laid down on page 77 as to directors being liable for profits made out of their position as agents of the banking company apply equally well to managers. A manager has been held not to be entitled to retain a commission received by him for negotiating the amalgamation of two banks. (*General Exchange Bank* v. *Horner*, 1870, 9 Ex., 480.) In that case Lord Romilly said, "He was a manager, bound to consult the shareholders' interest solely, and he cannot, in my opinion, retain to himself a pecuniary benefit obtained by him in his character of manager, not known to and not sanctioned by the shareholders who employed him."

Auditors.—The general position of auditors of a banking company was laid down in two cases as

follows:—"Although it is not the duty of the auditors of a company, appointed under the Companies Act 1879 (see pp. 68–70), to consider whether its business is prudently or imprudently conducted, it is their duty to consider and report to the shareholders whether the balance-sheet exhibits a correct view of the state of the company's affairs and the true financial position of the company at the time of the audit. They must ascertain this by examining the books of the company, and must take reasonable care that what they certify as to the company's financial position is true. And, except in very special cases, it is their duty to place before the shareholders the necessary information as to the true financial position of the company, and not merely to indicate the means of acquiring it" (In re *London and General Bank* (No. 2), 1895, 2 Ch., 673).

An auditor is not bound to be suspicious where there are no circumstances to arouse suspicion; he is only bound to exercise a reasonable amount of care and skill. "He is justified in believing tried servants of the company, in whom confidence is placed by the company. He is entitled to assume that they are honest, and to rely upon their representations, provided he takes reasonable care" (In re *Kingston Cotton Mill Co.* (No. 2), 1896, 2 Ch., 279).

In the winding-up of both these companies the question was raised whether auditors were officers of the company within the meaning of the 10th section of the Companies Winding-up Act 1890, and therefore liable to proceedings for misfeasance under that Act. In the case of the *London and General Bank*, the bank was registered under the Companies Act 1879, and in its articles of association the auditors were spoken of as officers. The Court held that the auditors were officers within the

meaning of the Act of 1890. In the case of the *Kingston Cotton Mill Company* the facts were not so clear, but the same result was arrived at, and it was laid down that the decision as to the *London and General Bank* was not to be lightly distinguished. It must be borne in mind that since these decisions were given the powers of auditors to see books and obtain information has been much strengthened by the provisions of section 113, sub-sections 1 and 2 of the Companies (Consolidation) Act 1908, as set out on p. 70 *supra*.

CHAPTER VIII

BRANCH BANKS

A BRANCH bank is in some respects treated as an independent bank, but in most respects it is treated as an integral part of the main business.

"The position of branch banks is that, in principle and in fact, they are agencies of one principal banking corporation or firm, notwithstanding that they may be regarded as distinct for special purposes, *e.g.* that of estimating the time at which notice of dishonour should be given, or of entitling a banker to refuse payment of a customer's cheque except at that branch where he keeps his account" (*Prince* v. *Oriental Bank Corporation*, 1878, 3 A. C., 325, at p. 332).

For purposes of bookkeeping and transmitting money from one branch to another, a bank and its branches are treated as one (see the actual decision in *Prince* v. *Oriental Bank Corporation*, given on p. 98).

So the accounts of a customer who has a separate account at two branches of the same bank may be treated in the same way as two separate accounts of a customer at one branch (see the case of *Garnett* v. *Mackewan*, 1872, L. R., 8 Ex., 10, cited on p. 96).

A branch bank cannot continue to carry on business

after notice that the main business has stopped; but there is no stoppage till such notice, for, till notice, there is no revocation of the authority to carry on business at such branch.

Where notice affects the liability of a bank, it is not necessary that notice should be given to all the branches of a bank. It is enough to give notice at the head office, and such notice will then be good against all branches after a reasonable time has elapsed to allow of a communication to be sent from the head office to the branches. In the case of *Willis* v. *Bank of England* (1835, 4 A. & E., 21) it appeared that one Norcliffe, on March 12th, 1833, committed an act of bankruptcy, and absconded from Liverpool. He took with him two bank post bills of the Bank of England for £200 each. On March 16th an application was made to the bank in London to stop the bills. On April 8th a further application was made, and it was then stated that a fiat of bankruptcy against Norcliffe was expected by every post. On April 12th Norcliffe persuaded a friend S. at Gloucester, who was known at the branch office of the Bank of England there, to get the bills changed for gold. S. and the branch bank were both ignorant of the act of bankruptcy, and the bills were accordingly changed. Norcliffe's assignees in bankruptcy sued the bank for the amount of the bills, and it was held that they must succeed, as there was sufficient notice to the head office to prevent the payment being protected as a *bonâ fide* one before issue of the commission of bankruptcy, and that the notice to the head office operated as notice to the branch bank, a reasonable time having elapsed for transmitting it before the bills were received there.

Exceptions.—There are two purposes for which branch banks are considered distinct from the head office or other

branches,—first, for payment of cheques; and secondly, for notices of dishonour.

A customer at one branch is not entitled to present a cheque elsewhere than at the branch where his account is. And a bank paying at one branch a cheque drawn on another branch is in the same position as if the cheque had been drawn on an entirely distinct bank (*Woodland* v. *Fear*, 1857, 7 E. & B., 519). Any other rule than this would be unworkable, as the facts of the case just cited will show. Fear held a cheque drawn by a customer of the Glastonbury branch of Stuckey's Bank on the Glastonbury branch, and, being in the neighbourhood of Bridgewater, presented it at the Bridgewater branch of the same bank. As the officers there knew him, they gave him cash for it. Had the cheque been presented at the same time at Glastonbury it would have been paid, but by the time the cheque in due course reached Glastonbury the customer had drawn out his balance and the cheque was dishonoured. The bank sued Fear for a return of the money paid for the cheque; and it was held that it must succeed, as it was under no obligation to cash the cheque at Bridgewater, and did so on the credit of Fear, and not as the bankers of their Glastonbury customer.

The different branches of a bank may be separate indorsees of bills of exchange, and, on a bill being dishonoured, may each claim the usual time in which to give notice of dishonour. (*Clode* v. *Bailey*, 1843, 12 M. & W., 51.) In that case a bill of exchange was indorsed to the Portmadoc branch of the National Provincial Bank of England by a customer, and sent by them to the Pwllheli branch, and by them indorsed to the head establishment in London, on whose presentation it was dishonoured. It was held that each branch of the

bank was to be considered as an independent indorsee, and entitled to the usual notice of dishonour; so that a notice of dishonour given by the Portmadoc branch to its customer in that course was good, although coming later than if sent direct from London.

But in *Fielding & Co.* v. *Corry* (1895, 1 Q. B., 268) the Court of Appeal held, by two judges to one, that a notice of dishonour sent through the post by mistake to the Cirencester branch of the County of Gloucester Bank instead of to the Cardiff branch on Monday, which was the last day for giving notice of dishonour, was effectually corrected by a telegram to the Cardiff branch on the Tuesday morning, though, had the telegram been the only notice given, it would have been out of time.

The decision turned on whether it was a case of directing the notice of dishonour to the wrong address or to the wrong person. Two judges thought it was a matter of wrong address, and the third that it was a matter of wrong person.

Companies (Consolidation) Act, sec. 108.—As has been said on p. 68, this Act requires a limited banking company to put up in a conspicuous part of the branch office, as well as of the head office, a copy of the statement of its capital, assets, and liabilities, required by this section.

CHAPTER IX

BANKER AND CUSTOMER

Definitions.—Both the terms "banker" and "customer" occur in Part III. of the Bills of Exchange Act 1882, which deals with cheques on a banker. The term "banker" is defined by the Act, though not to much purpose, while the term "customer" is left undefined. "Banker includes a body of persons, whether incorporated or not, who carry on the business of banking."

There must be some sort of account, either a current or deposit account, before the relation of banker and customer is constituted. (*Great Western Railway Company* v. *London and County Bank*, 1901, A. C., 414.) In that case it appeared that H. obtained by false pretences from the railway company a cheque crossed "& Co.," and marked not negotiable, and took it to the bank, where part of the cheque was paid into the account of one of their customers, and the balance handed to H. The bank had for years been in the habit of cashing cheques for H. in a similar manner. He had no account or pass-book with them. It was held that H. was not a customer of the bank.

General Relation.—The relation between a banker and his customer is the relation of a debtor to his creditor, or if the customer's account is overdrawn, that of a creditor

to his debtor (*Foley* v. *Hill*, 1848, 2 H. of L. Ca., 28). A customer does not cease to be a customer when his account is overdrawn (*Clarke* v. *London and County Bank*, 1897, 1 Q. B., 552). There are some special features attaching to this relation, which will be considered when the effect of this primary principle has been investigated.

1. Money lodged by a customer with his banker becomes the money of the banker, and is absolutely at his disposal. It is no immediate concern of the customer that the banker should use the money paid in by his customer either as a prudent man of business, or, indeed, in the business at all. There is nothing fiduciary in the relationship, and it is not the duty of the banker, but only his interest, to use such money so as to secure a profit to himself.

So strict is this rule that even when money is paid into the bankers for a specific purpose, if the banker stops payment before taking any step towards applying it to the purpose, the customer cannot recover the money paid, but has merely a right of proof as a general creditor.

In the case of In re *Barned's Banking Company* (1870, 39 L. J., Ch., 635), it appeared that a bill of exchange for £185, drawn by Massey on Fox, was by the latter accepted, payable at the office of Prescott & Co., the correspondents in London of Barned's Banking Company. Massey, on the day before the bill became due, paid into the office of the company at Liverpool, with which neither Massey nor Fox kept an account, the proper amount, to be remitted to Prescott & Co. in order to take up the bill on its becoming due. On the following day the bank stopped payment without having made the remittance to Prescott & Co. The bill was in consequence dishonoured, and subsequently paid by Massey. Massey claimed to be

paid the whole amount in the winding-up of the bank. The Court held that the bank was not a trustee of the money, and that Massey was only a simple creditor entitled to a dividend.

If, however, the specific purpose has been partially carried out, the case is different. Thus in the case of *Farley* v. *Turner* (1857, 26 L. J., Ch., 710), it appeared that a customer of bank A had a sum of £942 standing to his account. He paid in a further sum of £707, with a written direction that £500 out of that sum should be forwarded to bank B to meet a bill about to become due. A sum of £500 was sent as directed to bank B, but before the bill became due bank A ceased to carry on business, and the £500 was returned by bank B. The customer claimed back this £500; and it was held that, as it had been specifically appropriated, it belonged to him, and not to the general creditors.

Where a banker allows his customer to accept bills payable at the bank, and the customer subsequently pays in money to meet them, such money is considered to be specifically appropriated for the payment of the bills.

2. In the absence of special agreement, the keeping of distinct accounts with different headings, for the same customer, is purely a matter of account-keeping, and does not affect the rights of the parties as debtor and creditor. Thus, in the case of *Pedder* v. *The Mayor and Corporation of Preston* (1862, 31 L. J., C. P., 291), it appeared that the corporation of Preston, in addition to the ordinary functions of a municipal corporation, had functions under the Baths and Washhouses Act 1846, and others as a Local Board of Health, and kept at the plaintiffs' bank three separate accounts, corresponding to those three classes of transactions. At the time of the plaintiffs suspending payment, there was due from the

defendants, on the account of the municipal affairs of the corporation, a large sum of money, and there was due from the plaintiffs to the defendants, in respect of the Local Board of Health account, a similar sum. It was held that the defendants might set off these claims one against the other, inasmuch as, though the accounts were separate, the defendants were debtors in the one and creditors in the other, and in the same right.

That the two accounts should be in the same right is a necessary as well as a sufficient condition, and thus two or more accounts may be combined if they are respectively private and business accounts, or separate business accounts, but not if one is a private account and the other an account as executor, trustee, or public official. The mere fact that a solicitor has an "office" account, as well as a "private" account, and is in the habit of paying clients' money into the office account, is not enough, as against the banker, to impress the office account with the nature of a trust account, so that the banker cannot combine the two accounts (*Greenwood Teale* v. *Williams, Brown & Co.*, 1894, 11 T. L. R., 56). And the converse also holds. In the case of *Mutton* v. *Peat* (1900, 2 Ch., 79), it appeared that a firm of stockbrokers had two accounts with their bankers—a current account and a loan account. The current account was in funds, and the loan account was overdrawn against deposited securities. It was held that the two accounts must be treated as one, and that the bankers could only hold the securities for the net balance due to them on the combined accounts.

The same rule applies to accounts kept by the same person at different branches of the same bank. In the case of *Garnett* v. *Mackewan* (1872, 8 Ex., 10), it appeared that Garnett kept an account at the Leighton Buzzard branch of the London and County Bank, where the balance

in his favour was £42, 18s. 10d. He also had an account at the Buckingham branch of the same bank, which he had overdrawn to the amount of £42, 15s. 11d. Garnett drew cheques on the Leighton Buzzard branch for £23, but, before the cheques were presented, the bank had transferred the account of the Buckingham branch to the Leighton Buzzard branch, and, on presentation of the cheques, refused to cash them. The customer thereupon brought an action against the bank, but as he failed to show a special agreement to keep the accounts separate, the Court held that the bank had only done what it was entitled to do.

3. The debt of a banker to his customer, like any other simple contract debt, is barred at the end of six years by the Statute of Limitations, unless it is taken out of the Statute by a part payment of principal, or the allowance of interest, or some other sufficient acknowledgment of the debt by the banker (*Pott* v. *Clegg*, 1847, 16 M. & W., 321).

The doctrine that interest is an accessory which falls to the ground with the principal does not always apply to bankers' advances. The rule with regard to the appropriation of payments by which interest is presumed to be paid before principal is not applicable in the case of interest on an overdrawn account, which, according to the practice of bankers, has been from time to time converted into principal. (*Parr's Banking Coy.* v. *Yates*, 1898, 2 Q. B., 460.) In that case Yates had guaranteed to the bank payment of all moneys which might be owing to them in account with a customer, with interest, commission, and other banking charges; and it was provided that the guarantee should be a continuing guarantee, and should not be withdrawn except by six months' written notice from the guarantor. The bank

made advances to the customer by honouring his overdrafts from time to time down to a period more than six years before the action, but made no advances subsequently to that period, and the customer paid sums into his account with the bank against his liability from time to time, down to a period within six years before the action. The account was made up with half-yearly rests.

It was held that the advances were barred by the Statute, but that the action was maintainable in respect of interest which had accrued due from the customer within six years before the action, and had not been paid.

4. If the balance of an account is claimed from a banker by two different persons, the banker must interplead. This is a technical term for the procedure by which the banker brings both the claimants before the Court, and asks the Court to decide between them. He cannot pay the money into Court under the Trustee Relief Acts, nor, unless there has been an absolute assignment of the debt in writing, can he avail himself of similar proceedings under the Judicature Act, s. 25, sub-s. 6.

5. The entries which the banker makes in books which he keeps for his own private purposes are not conclusive as to the state of the account between him and his customer until he has made a communication of those entries to his customer; and the real meaning of an entry may be shown to be different from the apparent meaning. In the case of *Prince* v. *The Oriental Bank Corporation* (1878, 3 A. C., 325), it appeared that Prince paid into his account at the A branch of the Oriental Bank Corporation a promissory note which was payable at the B branch of the same bank. The note was passed on to the B branch, where the signatures of the makers were cancelled, and the note marked "paid." The amount of the note was transmitted by transfer drafts

to the A branch, and corresponding entries made in the books, and Prince was credited with the amount. Before this was communicated to Prince, it was discovered at the B branch that the maker's balance was insufficient to pay the note, and thereupon the note was at the A branch marked "cancelled in error," and was returned to Prince dishonoured. Prince brought an action against the bank for the amount of the note, but the Court held that the bank could not be charged with the receipt of the money.

In *Gaden* v. *Newfoundland Savings Bank* (1899, A. C., 281) the question was raised as to the meaning of an entry in a pass-book, and it was said, "the entry in the pass-book has been much relied on as showing that the respondents accepted the cheque as cash, but such entries are not conclusive. They are admissions only, and, as in the case of receipts for the payment of money, they do not debar the party sought to be bound by them from showing the real nature of the transactions which they are intended to record."

Special Features of the Relation

Duty to honour Customers' Cheques.—It is a special feature of the relationship between debtor and creditor, created by the opening of a banking account, that the banker is under an obligation to honour the drafts of his customer to the extent of the customer's balance (*Foley* v. *Hill*, 1848, 2 H. of L. Ca., 28).

A banker is bound by law to pay a cheque drawn by a customer within a reasonable time after the banker has received sufficient funds belonging to the customer. (*Marzetti* v. *Williams*, 1830, 1 B. & A., 415.) In this case it appeared that the customer paid in a Bank of England note for £40 to his account in the morning,

and that a cheque of his was presented in the afternoon for an amount in excess of his balance as it stood before the note was paid in. The paying clerk being unaware that the note had been paid in, refused to honour the cheque. It was held that the bank was liable to pay damages.

In the case of *Forman* v. *Bank of England* (1902, 18 T. L. R., 339), a cheque was wrongly collected through the country clearing-house, instead of through the town clearing-house. The customer who paid it in drew against it the next day and his cheque was dishonoured. It was held that the bank was liable to pay damages. The cheque was in the following form:—

"Norwich Union Life Insurance Society, No. 889. Norwich, May 20, 1901. Barclay & Co., Ltd., with which has been incorporated Gurneys, Birkbecks, Barclay & Buxton, Bank Plain, Norwich, or head office, 54 Lombard St., London. Pay to Thomas W. Forman or order Five hundred pounds." The jury found that there was a recognised and general custom amongst London bankers that cheques in this form should be treated as London cheques.

Provided that the balance is sufficient, there is only one case in which a banker should not honour his customer's cheque, and that is when the customer is attempting to deal with that money so as to commit a breach of trust, and the banker, by honouring the cheque, would become a party to such breach.

In the case of *Gray* v. *Johnston* (1868, 3 E. & I., 1), the following rule was laid down by Earl Cairns: "In order to hold a banker justified in refusing to pay a demand of his customer, the customer being an executor, and drawing a cheque as an executor, there must, in the first place, be some misapplication, some breach of trust,

intended by the executor, and there must, in the second place, be proof that the bank is privy to the intent to make this misapplication of the trust funds. . . . If it be shown that any personal benefit to the bankers themselves is designed or stipulated for, that circumstance, above all others, will most readily establish the fact that the banker is in privity with the breach of trust which is about to be committed."

There cannot even be a possible occasion for the application of this exceptional rule unless the money is strictly trust money, and not merely money for which the customer must account to some third person. Thus, in the case of *Tassell* v. *Cooper* (1850, 9 C. B., 509), it appeared that Tassell had been farm-bailiff to Lord D. After Tassell had left Lord D.'s employment he received a cheque for £180 in payment for wheat belonging to Lord D., which he had sold on his account while acting as bailiff. This cheque Tassell paid into his bankers, who, in the usual way, received the money, and gave Tassell credit for it. Afterwards Lord D. went to the bank, informed them of the circumstances, claimed the money as his, and requested them not to honour Tassell's drafts. The bank agreed to do this upon receiving an indemnity from Lord D. Tassell, finding his draft dishonoured, brought an action against the bank, and the Court held that he was entitled to succeed, on the ground that, even assuming that the cheque had been improperly obtained by Tassell, still, as between him and his bankers, the amount was recoverable by him as money had and received by the bankers to his use. For further details as to trust accounts see pp. 112–116.

If a banker wrongly refuses to honour his customer's cheque, the customer is entitled to substantial but temperate damages, such as will be a reasonable compen-

sation for the injury which he must have sustained from the dishonour of his cheque (*Fleming* v. *Bank of New Zealand*, 1900, A. C., 577).

Banker's Lien.—The second special feature attaching to the relationship of banker and customer is the right of the banker, when the customer's account is overdrawn, to a general lien on such of his customer's money securities as come into the banker's hands in the ordinary course of his business. This lien is part of the law-merchant, and is to be judicially noticed, like the negotiability of bills of exchange (*Brandao* v. *Barnett*, 1846, 12 Cl. & Fin., 787). There is some doubt as to what are money securities within the rule, but negotiable instruments of all sorts are within it, so also share certificates, but apparently not a lease.

The rule is general, and will apply in all cases, unless the customer can prove an express contract, or circumstances that show an implied contract inconsistent with the existence of the lien. Thus it has been said that if bills of exchange were delivered to a banker merely for the purpose of being deposited in a box there could be no lien. In the case of *Brandao* v. *Barnett*, supra, it appeared that A kept an account with C as his banker, and at C's banking house kept tin boxes, in which he deposited Exchequer bills, and of which he kept the keys. On December 1st, 1836, A took out of a tin box several Exchequer bills, which he delivered to C, requesting C to get the interest due on them, and to get the Exchequer bills exchanged for others. C did so. Before A came to take back the Exchequer bills, acceptances of his beyond the amount of his cash-credit account were presented at C's bank and paid. A afterwards became bankrupt. It was held that C had not a lien on the Exchequer bills in his hands for the balance due to him on A's account.

In a later case (In re *United Service Company*, 1870, 6 Ch. Ap., 212), it appeared that railway share certificates had been deposited with the company, who acted as bankers, for safe custody and the collection of dividends. The company was to receive a small commission. There it was said that the certificates came into the custody of the company in the ordinary course of its business as bankers, that they were deposited with the bank by a customer of the bank, and that such deposit was made under such circumstances as would have entitled the bank to a lien upon them for their general banking account.

A deposit of securities to cover an overdraft on one account, where the customer keeps several, is not inconsistent with the right of the banker to assert his lien on those securities for the general balance. Thus, in the case of In re *European Bank* (1872, 8 Ch. Ap., 41), the Oriental Bank kept three accounts at the Agra Bank, namely, a loan, discount, and general account. In the course of usual transactions the Oriental Bank deposited three bills of exchange with the Agra Bank, accompanied by a letter stating that they proposed to draw upon them for £10,500, but that as their credit would not afford a margin to that extent, they sent these bills as collateral security. The Oriental Bank became insolvent. The loan account was satisfied without recourse to the deposited bills, but the general balance was still against the Oriental Bank. The Agra Bank claimed to hold the bills for the balance of the general account, and the Court held that there was nothing in the terms of the contract under which they took the bills inconsistent with their right of lien. "In truth," said Lord James, "as between banker and customer, whatever number of accounts are kept in the books, the whole is really but one account, and it is not open to the customer, in the absence of

some special contract, to say that the securities which he deposits are only applicable to one account." In the same way it is not open to the banker to say that the securities are only applicable to one account (see *Mutton* v. *Peat*, p. 96).

If the banker has notice that the securities are not the property of his customer, he cannot enforce his lien against the true owner (see pp. 155–6). Nor has a banker a lien on securities which come into his hands by chance —as, for instance, by being accidentally left by a customer at the banking house (*Lucas* v. *Dorrein*, 1817, 7 Taunt., 278).

By the Bills of Exchange Act 1882, s. 27 (3), it is enacted that "where the holder of a bill has a lien on it, arising either by contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien." If the banker cannot get payment from his customer, he may realise the effects on which he has a lien. This is an exception to the general rules as to lien; but as these effects are generally negotiable instruments, early realisation is often a necessity.

Customer's Right to Secrecy.—The third special feature is, that the banker must not disclose the state of his customer's account, except upon a reasonable and proper occasion. There is some doubt as to the exact foundation of this right to secrecy: if it is an implied term of the contract between banker and customer, then an unjustifiable disclosure is a ground of action, for which nominal damages can be recovered, although the customer has suffered no actual loss or damage; if, however,—and perhaps this is the better opinion,—there is merely cast upon the banker a duty not to act to the prejudice of his customer, then special damage, such as actual loss of money or reputation, must be proved, otherwise the

breach of duty is not actionable (*Hardy* v. *Veasey*, 1868, 3 Ex., 107).

The fact that the customer's account is overdrawn is not sufficient to warrant a disclosure of the state of the account, nor, when a cheque is dishonoured, is it justifiable to say more than "not sufficient assets," or its equivalent.

Inquiries about Customer.—The following general principle was laid down in *Waller* v. *Loch* (1881, 7 Q. B. D., at p. 622):—"If a person who is thinking of dealing with another in any matter of business asks a question about his character from some one who has means of knowledge, it is for the interests of society that the question should be answered, and if answered *bonâ fide* and without malice, the answer is a privileged communication." This principle, no doubt, also applies to answers given to questions as to customer's general financial position, so long as the answers do not contain detailed information infringing the customer's right to have the state of his account kept secret. For the protection afforded by section 6 of Lord Tenterden's Act, see p. 83.

Bankers' Charges.—As long as the relation of banker and customer exists, the banker has the right to make charges for commission and interest. Sometimes customers make express bargains as to charges, and then the terms of the bargain must be observed until altered by a fresh agreement. Very often the customer merely acquiesces in the charges which the banker has thought fit to make, and then the Court will in general imply a promise by the customer to pay charges already acquiesced in, although such a promise may not reach to future charges. (*Williamson* v. *Williamson*, 1869, 7 Eq., 542.) In that case a banking account which was largely overdrawn had been, for the half-year ending June 1867,

charged with interest at 5 per cent., and with a gross sum of £500 for commission, in lieu of the charge of ½ per cent. previously made. The pass-book, balanced on this footing, was sent to the customer, and the charges were explained to his agent. The customer died in December 1867 without having raised any objection to the charges, and the account was continued by his executors. It was held that the charge of £500 for commission had been acquiesced in, and was valid for June 1867; but that acquiescence could not be inferred for subsequent half-years, there being nothing in the entry for the particular half-year that amounted to a contract to the same effect in future.

It has also been laid down that, when the accounts between banker and customer have been carried on for a series of years on a particular principle, the Court will assume that there is an agreement to that effect; but acquiescence in the principle does not amount to a settlement of account (*Mosse* v. *Salt*, 1863, 32 L. J., Ch., 756).

It is usual for the banker to add his charges on to the customer's debt, or to deduct them from his balance at fixed periods, and there is no objection to his charging in this way compound interest. It is very usual to balance the account each half-year. In charging interest on overdrafts, the date of the payment of cheques, not the date on the face of the cheques, is the date from which the interest should be computed. If a customer becomes bankrupt or dies, the relationship of banker and customer ceases, and thereupon the banker ceases to be entitled to charge compound interest, and has merely the right to charge simple interest on the balance due to him at the time of the customer's bankruptcy or death (*Williamson* v. *Williamson*, supra).

Customer and Banker's Agent.—A banker who has business to transact in a place where there is no branch of the bank must employ another bank as agent or correspondent. In general there is no privity between the customer and the agent, and the principal must stand or fall by the agent's acts. Thus, if the agent bank receives money for the principal bank, but fails before actually transmitting the money to the principal bank, the customer of the principal bank can claim to be credited with the money, as the receipt by the agent is in law receipt by the principal (*Mackersey* v. *Ramsays*, 1843, 9 Cl. & Fin., 818). The rule is the same where it is the agent bank which remains solvent, and the principal bank which fails. The principal's customer cannot recover the payment from the agent bank, because in law the payment into the agent bank is a payment to the principal bank (*Williams* v. *Deacon*, 1849, 4 Ex., 397). The converse is also true, namely, that where the agent bank has paid money for the principal bank, it is the principal bank, and not the agent bank, which has the right to recover payment from the principal's customer. (*Barkworth* v. *Ellerman*, 1861, 6 H. & N., 605.) In that case the London agents of a Hull bank had accepted and paid bills on behalf of a customer of the Hull bank. The Hull bank became bankrupt, and the London agents paid all bills accepted by them which were due after the bankruptcy. It was held that the assignees in bankruptcy of the Hull bank, and not the London agents, were entitled to recover from the customer of the Hull bank the amount of such bills.

Closing of the Current Account.—A current account may be closed by the voluntary act of the parties, or by the happening of some event incompatible with the continuance of the relationship of banker and customer.

Thus a customer may at any moment withdraw the whole of his balance, with an intimation that he will not continue the account, or the banker may give the customer reasonable notice that he is not prepared to accept any further sums from the customer. Or the customer may assign the whole of his balance to a third party, and give notice of the assignment to the bank. Involuntary acts incompatible with the continuance of the relationship are the death or insanity of the customer, or, in the case of a limited company, its going into voluntary liquidation, or the making of a winding-up order. On notice of an available act of bankruptcy on the part of the customer, the banker must refuse to honour the customer's cheques. The bankruptcy or winding-up of the banker similarly puts an end to the relationship of banker and customer.

Garnishee Order.—Where judgment has been obtained against a debtor, the whole of the debtor's property is answerable, including any debts due to the judgment debtor. In order to get hold of or attach these debts, the judgment creditor applies to the Court for an order, called a garnishee order directed to the debtor, called the garnishee, who owes money to the judgment debtor. Service of the garnishee order binds the debt in the garnishee's hands, and the garnishee, if he does not dispute that the debt is owing, must pay the amount of the debt into Court if less than the amount of judgment, or pay into Court an amount equal to the amount of the judgment if the debt exceeds the amount of the judgment. Thus if A gets judgment against B for £100, and B has a balance of £500 at his bankers, A can get a garnishee order for the payment of £100 and serve it on the bankers, who must pay that amount into Court out of B's balance. If the figures were reversed, then the

bankers would have to pay the whole of B's balance into Court. The payment into Court is a discharge to the bankers in their account with their customer to the extent of the amount so paid. The ordinary form of garnishee order binds the whole of the balance standing to the customer's credit, even when the balance is more than sufficient to satisfy the garnishee order; and until the order is satisfied, the banker has the right to dishonour the customer's cheques (*Rogers* v. *Whiteley*, 1892, A. C., 118).

In garnishee proceedings there are two stages, of which the first is the making of the garnishee order *nisi*. The effect of this is to give the judgment creditor an equitable charge on the garnished debt, but this charge takes effect subject to any other equities in existence at the date of the order. The second stage is the making of the garnishee order *absolute*. The effect of this is to give the judgment creditor leave to realise his equitable charge. The payment by the garnishee to the judgment creditor is a realisation of his charge.

Thus where there are debenture holders who have a floating charge on all the assets of a company, and a garnishee order is made against the company, the order takes effect subject to the equitable right of the debenture holders to appoint a receiver of the company's property. Such debenture holders on appointing a receiver have priority over a garnishee order absolute under which the payment has not actually been made (*Cairney* v. *Bach*, 1906, 2 K. B., 746).

CHAPTER X

BANKERS AND THIRD PERSONS

Bankers not Liable to Third Persons.—If a customer pays into his banking account money belonging to some third person, the banker is not entitled, even when that fact is brought to his knowledge, to dishonour a cheque of his customer's drawn for the purpose of drawing out that money; and if the customer's account is already overdrawn, the banker may retain the money so paid in against the claim of the third person.

The correlative rule is equally good, and has been thus expressed: "If A pays money to B, who pays it to his banker to his own account without notice, A cannot recover that money from the banker."

The following are examples of these rules. A was the managing owner of a vessel. He and the other part owners were as such the owners of two warrants of the East India Company for freight. These warrants were left in the hands of A, the managing owner, who paid them into his banking account. The bankers received the money due on them and gave A credit for it. The other part owners sought to recover the money from the bankers, but it was held that they were not entitled so to do (*Sims* v. *Bond*, 1833, 5 B. & A., 393).

Where a managing director of a butter company had

drawn cheques on the company's balance and had paid them into his private account at the same bank, which was overdrawn, the company failed to recover the amounts from the bank, as it was held that the bank, acting in good faith and without notice of any irregularity, was not bound, before honouring the cheques, to inquire into the state of the account between the company and its managing director (*The Bank of New South Wales* v. *Goulbourn Valley Butter Company*, 1902, A. C., 543).

A broker paid a cheque, given him in payment for shares sold, into his own overdrawn account. The bank was aware that the cheque was the proceeds of the sale of shares, but did not know, and had made no inquiry, whether the money paid in was in the broker's hands as agent or otherwise. The owners of the shares claimed the money, but it was held that the bank was entitled to retain the money in discharge *pro tanto* of the debt due to it from the broker (*Thomson* v. *Clydesdale Bank Limited*, 1893, A. C., 282). In his judgment Lord Herschell said (p. 287), "It cannot, I think, be questioned that under ordinary circumstances a person, be he banker or other, who takes money from his debtor in discharge of a debt, is not bound to inquire into the manner in which the person so paying the debt acquired the money with which he pays it. However that money may have been acquired by the person making the payment, the person taking that payment is entitled to retain it in discharge of the debt which is due to him. I cannot assent to the proposition that, even if a person receiving money knows that such money has been received by the person paying it to him on account of other persons, that of itself is sufficient to prevent the payment being a good payment, and properly discharging the debt due to the person who receives the money. No doubt, if

the person receiving the money has reason to believe that the payment is being made in fraud of a third person, and that the person making the payment is handing over in discharge of his debt money which he has no right to hand over, then the person taking such payment would not be entitled to retain the money, upon ordinary principles which I need not dwell upon."

This rule also applies although the banker holds the money for the benefit of a third person, so long as notice of that fact has not been given to that third person. *Moore* v. *Bushell* (1857, 27 L. J., Ex., 3). In that case it appeared that A accepted a bill of exchange payable at the correspondents of his bankers to one Moore. Just before the bill became due A paid its amount into his banking account for the purpose of taking up the bill, and the bankers promised to apply it to that purpose. The bankers entered the amount to the credit of their correspondents, but it did not appear that they had advised their correspondents to pay it. The drawer, the holder of the bill, sued A's bankers for the amount, but it was held that the action could not be supported, as, although the bankers were in fault, there was no privity between the parties.

But the case is different where the banker has told the third person that he holds the money for him. (*Noble* v. *National Discount Company*, 1860, 5 H. & N., 225.) In that case the holders of a draft presented it in the evening, and, instead of receiving the money, said they would call another time. To this the discount company assented, and the Court held that in effect they said "call again and we will pay you." After this the company were bound to retain in their hands so much money as the order dealt with, for the use of the holders.

Except for Trust Moneys.—In dealing with the case of

trust moneys, we must distinguish between those cases in which the trust money is paid into an overdrawn account, so that the banker has an interest in asserting his right to treat it as his customer's money, and other cases where the customer's account is in credit, and the only question for the banker is whether he ought to honour his customer's cheque or hand the money over to some third person.

In the first class of case, viz., where the account is overdrawn, if the bank is not shown to have received the money as trust funds, or to have received during the currency of the account notice of their trust character, the bank is entitled to retain the money. (*Union Bank of Australia Ltd.* v. *Murray-Aynsley*, 1898, A. C., 693.) In that case it appeared that two partners, who were also trustees, paid trust moneys into the firm's bankers to a new account of the firm called "account No. 3." The business was turned into a company and failed, and accounts Nos. 1 and 2 showed a large balance due to the bank. It was held that the bank was entitled to set off the balance of account No. 3 against its own claim against the company in liquidation.

In the second class of case, viz., where the account is not overdrawn, the following rule has been laid down: "If money held by a person in a fiduciary character has been paid by him to his account at his bankers, the person for whom he held the money can follow it, and has a charge on the balance in the bankers' hands." (In re *Hallett's Estate*, 1879, 13 Ch. D., 696.) This rule has been followed in recent cases. If such money has been mixed with the customer's money, the whole will be treated as of the nature of trust property, except so far as the customer may be able to distinguish what is his own (*Frith* v. *Cartland*, 1865, 2 H. & M., 417). Thus,

in the case of *Hancock* v. *Smith* (1889, 41 Ch. D., 456), it appeared that a stockbroker paid into his own banking account various sums belonging to his clients, and lodged in his hands for investment. He withdrew all his own money, and there was finally left a balance which was claimed by two of his clients, and no others, and was just sufficient to meet their claims. A judgment creditor of the stockbroker had, however, obtained a garnishee order on the balance. In the dispute that arose between the clients and the judgment creditor, it was held that the money belonged to the clients. For a discussion of the questions which arise where there are several claimants to the balance, and there is not enough to satisfy all, the reader is referred to Chapter XII., on the "Appropriation of Payments."

What is sufficient Notice?—So far, we have been discussing cases in which the money paid into the customer's account has been received by the banker without notice of its fiduciary character; as, under such circumstances, the banker cannot be called upon to pay twice, it is of little interest to him whom he eventually pays. But if a banker deals improperly with funds which, as he knows or ought to know, bear a fiduciary character, he will be liable for any loss resulting therefrom to the real owners.

Notice of the nature of an account may be express or may be implied from the heading of the account or other circumstances.

In the case of *Bodenham* v. *Hoskyns* (1852, 21 L. J., Ch., 864), it appeared that Bodenham was the owner of an estate, and employed an agent to collect the rents. The agent paid the rents into a bank, to an account headed with the name of the estate, to distinguish it from his private account. The bank allowed the agent to overdraw his private account, and then, in order to

balance the account, allowed him to transfer the balance of the estate account to the private account. Bodenham brought a Chancery suit against the bankers to obtain his rents; and on proof that the bank knew that the balance transferred was the produce of the rents of his estates, a decree was made against the bankers for repayment.

Even where there is no actual transference of balance, and a customer has two accounts, one of which is a private account and the other in the nature of a trust account, a banker may incur a heavy loss if he allows his customer to overdraw the private account on the strength of a balance to his credit on the trust account. Thus, in the case of In re *Gross ex p. Kingston* (1871, 6 Ch. Ap., 632), it appeared that Gross, a county treasurer, kept two accounts at his bank, one headed "Police Account" and the other a private account. The bank treated the two accounts as practically one, and paid the interest on the total or net balance into his private account. Gross overdrew his private account and absconded. The county magistrates brought a suit in equity to recover the balance of the police account, whereupon the bank attempted to set off the adverse balance on the private account. It was held that they were not entitled to do this.

The last case bearing on this point is that of *Coleman* v. *Bucks & Oxon Union Bank* (1892, 2 Ch., 243). There it appeared that country bankers with whom A had a current account received from their London agents a sum of money to be placed to the credit of A's trust account. A had no trust account with the bankers, and they accordingly placed it to the credit of his current account and advised him thereof. A knew it was trust money, but gave no instructions to the bankers, and

continued to draw on his account as usual. At the time the trust money was credited to his current account A was overdrawn on securities deposited with the bankers, and the effect of so crediting him was to reduce largely his overdraft temporarily. A, however, was in good credit, and the bankers had no intention of benefiting themselves, and no suspicion that A contemplated a breach of trust, and they continued to allow him a further and extended overdraft on further securities deposited with them until his bankruptcy some time afterwards. It was held that the bankers were not liable to make good to the persons for whom the money was held in trust the money so lost. The decision was based on the principles laid down in *Gray* v. *Johnston* (1868, 3 E. & I., 1; see p. 100).

CHAPTER XI

BANKERS' ACCOUNTS

Pass-Book.—A banker, besides keeping the usual business books for his own convenience, gives to his customer a book now commonly called a pass-book, but once known as a passage book, in which the accounts between the parties are shown. The nature of this book, from a business point of view, was the subject of judicial inquiry in the year 1816, and the report[1] is still so applicable to modern banking business as to justify its reproduction here at length. "A book called a passage book is opened by the bankers and delivered by them to the customer, in which at the head of the first folio, *and there only*, the bankers by the name of their firm are described as the debtors, and the customer as the creditor, in the account; and on the debtor side are entered all sums paid to or received by the bankers on account of the customer; and on the creditor side all sums paid by them to him, or on his account; and the said entries being summed up at the bottom of each page, the amount of each, or the balance between them, is carried over to the next folio without further mention of the names of the parties,

[1] This report is not a judgment of the Court, and the inferences drawn therein as to the effect of a customer's silence do not set forth the true legal consequence of such conduct.

until, from the passage book being full, it becomes necessary to open and deliver out to the customer a new book of the same kind." (At the present day there is also another form in use, in which the entries on the debtor side and creditor side are reversed.) "For the purpose of having the passage book made up by the bankers from their own books of account, the customer returns it to them from time to time as he thinks fit; and the proper entries being made by them up to the day on which it is left for that purpose, they deliver it again to the customer, who thereupon examines it, and if there appear any error or omission, brings it or sends it back to be rectified, or if not, his silence[1] is regarded as an admission that the entries are correct; but no other settlement, statement, or delivery of accounts, or any other transaction which can be regarded as the closing of an old or the opening of a new account, or as varying, renewing, or confirming (in respect of the persons of the parties mutually dealing) the credit given on either side, takes place in the ordinary course of business, unless when the name or firm of one of the parties is altered, and a new account thereupon opened in the new name or firm. The course of business is the same between such bankers and their customers resident at a distance from the metropolis, except that, to avoid the inconvenience of sending in and returning the passage book, accounts are, from time to time, made out by the bankers, and transmitted to the customer in the country when required by him, containing the same entries as are made in the passage books; but with the names of the parties, debtor and creditor, at the head, and with the balance struck at the foot of each account; on receipt of which accounts, the customer, if there appears to be any error or omission,

[1] See note on p. 117.

points out the same by letter to the bankers; but if not, his silence[1] after the receipt of the account is in like manner regarded as an admission of the truth of the account, and no other adjustment, statement, or allowance thereof usually takes place" (*Devaynes* v. *Noble*, 1 Mer., 530).

Entries in a banker's books are never evidence in his favour, but a pass-book may be so dealt with by a customer, that the entries therein become a settled or stated account. If the banker is led to alter his position by the negligent action of the customer with regard to the entries in the pass-book, the customer may be precluded from disputing the accuracy of the entries. "What acts or omissions on the part of the customer will amount to a settlement of account, or to negligence in the matter, can hardly be ascertained from the English cases. It is, however, submitted that something more than the receipt by the customer of the pass-book and cashed cheques, and the return of the former to the banker, is necessary to render the account stated or settled; and that the mere omission on the part of the customer to examine the entries and cheques with businesslike promptitude does not constitute negligence" (Hart, p. 205).

Entries in the pass-book or other books of the banker are only *primâ facie* evidence against him (*Commercial Bank of Scotland* v. *Rhind*, 1860, 3 Macq., 643). It is open to the banker to show that the entries were made in mistake. Thus it appeared, in the case of *Hume* v. *Bolland* (1832, 1 C. & M., 130),[2] that a partner in a

[1] See note on page 113.

[2] This case is only cited as an authority for the proposition that the bankers could prove the real facts in spite of the book entries. The decision as to the partnership liability is probably not now good law.

bank had fraudulently sold stock entrusted to the bank by a customer. The dividends were, however, entered in the customer's account as having been received. The customer sued the bank for them, but it was held that it was open to the banker to prove that the dividends had never been received by them. If, through the negligence of the banker, the customer has been led to alter his position, the banker may be precluded from disputing the accuracy of the entries.

If the title of the banking firm is changed in the pass-book, that is sufficient notice to the customer of a change in the firm; if the account is continued in the same way, except for the change of name, that is sufficient notice to the customer that the new firm has taken over the securities and liabilities of the old firm (*Cavendish* v. *Greaves*, 1857, 27 L. J., Ch., 314).

Production of Accounts.—It should be noticed that, in actions by or against the customers of a bank, it is often important to see the books of the customer's bankers, as they may afford very valuable evidence as to the business of a customer, and the payment to or by him of money. As, however, it was found very inconvenient for bankers that their actual business books should be taken away for production in Court, an Act was passed in the year 1876, called the Bankers' Books Evidence Act, which was subsequently replaced by an Act of the year 1879. The latter Act enacts that a copy of any entry in a banking book shall (subject to certain provisos) be received in all legal proceedings as *primâ facie* evidence of such entry, and of the matters, transactions, and accounts therein recorded. Before the copy can be used it must be proved that the book was, at the time of the making of the entry, one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course

of business, and that the book is in the custody and control of the bank. Further, the correctness of the copy must be verified. Where the machinery of the Act is applicable, a banker or officer of the bank is not to be compellable, in any legal proceeding to which the bank is not a party, to produce the books of the bank or to prove their contents, unless by order of a judge made for special cause. The Court or a judge may give parties to a legal proceeding leave to inspect and take copies of entries in a banker's books. A bank is entitled to three days' notice of any such order.

There is some doubt as to how far the Act applies to the accounts of persons not parties to the legal proceedings. Inspection of entries in a banker's books relating to an account kept in the name of a person not a party to the action can be ordered under the Act where the Court is satisfied that those entries will be admissible in evidence against a party to the action at the trial; but such an order ought not to be made without notice to such person, nor then unless very strong grounds are shown for thinking that there are entries in the account which are material to the case of the party asking for inspection (*S. Staffordshire Tramways Company* v. *Ebbsmith*, 1895, 2 Q. B., 669). An order for inspection of entries in a banker's books will, as a general rule, be made only where there are entries in an account which is in form and substance the account of one of the parties to the litigation. If the Court has jurisdiction to order inspection of the banking account of a person not concerned with the litigation, it will exercise the jurisdiction with the greatest caution (*Pollock* v. *Garle*, 1898, 1 Ch., 1).

CHAPTER XII

APPROPRIATION OF PAYMENTS

Special Appropriation. — It is competent for a customer to give any directions he may please as to the application of money paid by him into his banking account, and the banker, by receiving it subject to such directions, agrees that the money shall be applied as directed, and in no other way. Thus, if money is paid in by the customer with a particular object, as to take up a bill of exchange, the banker must apply it to that object, and even if the customer's account is overdrawn, cannot keep it for himself. In default of special directions given by the customer, the banker may appropriate the payment in ; and on communication of his appropriation to the customer, such appropriation becomes irrevocable.

"There can be no doubt what the law of England is on the subject. When a debtor is making a payment to his creditor he may appropriate the money as he pleases, and the creditor must apply it accordingly. If the debtor does not make any appropriation at the time when he makes the payment, the right of appropriation devolves on the creditor. In 1816, when Clayton's case was decided, there seems to have been authority for saying that the creditor was bound to make his election

at once according to the rule of the civil law, or at any rate within a reasonable time, whatever that expression may be taken to mean. But it has long been held, and it is now quite settled, that the creditor has the right of election up to the very last moment, and he is not bound to declare his election in express terms. Where the election is with the creditor, it is always his intention, express, or implied or presumed, and not any rigid rule of law, that governs the application of the money" (Lord Macnaghten's judgment in *The Mecca*, 1897, A. C., 293, cited in *Seymour* v. *Pickett*, 1905, 1 K. B., 715).

When the payment of particular advances has been provided for in a particular way for several years, the banker cannot appropriate payments made by the customer to his general account in breach of the understanding between them. Thus it was held that where bankers had taken up bills for a customer on the security of consignments, and by a course of dealing with him had permitted him to draw on his account without reference to the advances on the consignments, they could not, by appropriating those advances to the debit side of the account, in the absence of express notice, treat it as overdrawn, and dishonour the customer's cheques before the consignments were realised (*Cumming* v. *Shand*, 1860, 5 H. & N., 95).

Rule in Clayton's Case.—It is, however, most usual for payments into and out of an account to be made without the customer giving any special direction, or the banker making a special appropriation, or *vice versâ*.

In such cases the appropriation of the payment is governed by what is generally known as the rule in Clayton's case. This rule provides that a payment shall discharge the earliest debt, whether of the customer or the banker, then remaining unpaid. The practical effect of

this most important rule will perhaps be best grasped from an example. A customer of a London private bank borrowed £2000 from the bank, and to secure payment of that sum gave the bank nine promissory notes for £200 each and one for £250. The bank also took a promise from a surety for repayment. The first note was payable about ten weeks after the loan, and the second a week later, and so on. The £2000 was placed to the customer's credit. On the first five due dates, the sums represented by the first five notes were debited by the bank to the customer in the current account, but the last five notes were not so debited. At the close of each of the first two due dates the balance was in the customer's favour, but afterwards the balances were considerably against the customer. After the last promissory note became due, enough was eventually paid in to cover the total amount of the adverse balance as it stood when that note became due; but as money was also constantly being withdrawn, the balance still stood against the customer. The bank sued the surety on the assumption that the promissory note had never been discharged, but the Court held that the customer's debts had been discharged in order of date under the rule in Clayton's case, so that the promissory notes had been paid (*Kinnaird* v. *Webster*, 1878, 10 Ch. D., 139).

A surety cannot, however, claim the benefit of this rule if it was the intention of the parties that the security should be a continuing one to secure the customer's floating balance (see pp. 218–9).

The rule has important effects if either the bankers or the customers are a firm of partners, whose constitution has changed without a discontinuance of the account. For instance, if there is a change in the banking firm, and an adverse balance against the customer, then subse-

quent payments by the customers to the new firm will be applied first to the extinction of the debt to the old firm. Meanwhile, sums drawn out will be debts belonging to the new firm; and as soon as the old adverse balance has been wiped out by new payments in, the debt belonging to the old firm will have been extinguished, and the new firm will be creditors of the customers for the new adverse balance (see *Beal* v. *Caddick*, 1857, 26 L. J., Ex., 356). So, where there has been a change in the customer's firm, as soon as the adverse balance has been wiped out by fresh payments in, the liability of the old firm to the bank will have been discharged, and the bank can only look to the new firm for the repayment of subsequent advances. If, however, the account of the old firm has been kept distinct, and accounts have been rendered to the customer on that footing, that is equivalent to an appropriation of the new payments to the credit of the new firm, and the liability of the old firm is not affected. These rules only apply in default of express agreement. Where security for a current account is taken either from the customer or a surety for him, an agreement should be signed expressly making provision for these points.

Trust Money.—It has been held that the rule in Clayton's case is not to be applied where a customer has mixed trust money with his own money. In such a case the customer must be taken to have drawn out his own money in preference to the trust money. Thus, if A has a balance of £400 at his bankers, and he then pays in £1000 out of a fund of which he is trustee, and afterwards pays in £1600 more of his own money, and draws out £1500, the draft of £1500 will not be taken to include the £1000 of trust money; but the £1500 remaining in the bank will be, as to £1000 thereof, trust

money (In re *Halletts' Estates*, 1879, 13 Ch. D., 696, and In re *Oatway*, 1903, 2 Ch., 356). If the trust moneys of several persons are thus mixed, and what is left is not sufficient to satisfy all, Clayton's case will apply as between the claimants. Thus, A has a balance of £400. To this he pays successively £300 of which he is trustee for B, £300 of which he is trustee for C, and £400 of which he is trustee for D. He afterwards pays in £600 of his own, and draws out £1500. Of the final balance of £500, B will be entitled to nothing, C to £100, and D to £400 (In re *Stenning*, *Wood* v. *Stenning*, 1895, 2 Ch., 433).

Rights of Third Party.—A banker may disable himself from appropriating a payment to his own debt by promising a third party that he will appropriate such payment of his customer for the benefit of the third party. Where A paid into his account a cheque for £250 drawn by B, another customer of the bank, whose account was overdrawn, the bank wrote to say that, as the payments of B which were unappropriated only amounted to £237, they would hold the cheque, in the hope that more money would come in. More money came in, and the bankers refused to pay the cheque, and claimed to keep the moneys in reduction of the adverse balance due from B to them. It was held that A could sue the bankers for the £250, on the ground that they had arranged with him to appropriate it for his benefit (*Kilsby* v. *Williams*, 1822, 5 B. & Ald., 815). But there must be a clear appropriation. Watson & Co. were bankers carrying on business in London and India. Two sums of money were paid to them in London, to be remitted through their Bombay branch to a third person about to proceed to India. Neither the person who paid the money nor the person to whom it was to be remitted were customers of

the bankers. The bankers became bankrupt, and the receiving order was made before the arrival at Bombay of the person to whom the money was to be remitted. It was held that no trust was constituted, and that the person who paid the money had no right to be paid in full, in priority to the other creditors; and that the ordinary relationship of debtor and creditor was established between the bankers and the person to whom the money was to have been remitted (In re *Watson & Co., ex parte Lloyd*, 1904, 91 L. T., 665).

CHAPTER XIII

SPECIAL CUSTOMERS. CORPORATIONS AND COMPANIES

THE only form of a corporation known to the common law was a corporation created by charter granted by the Crown. Such a corporation is an artificial person, and the charter is the writing which brings this artificial person into existence, and defines its objects and powers. The bulk of commercial companies are now incorporated either by private Act of Parliament, as in the case of railway companies, or by registration under a general Act of Parliament, such as the Companies Act. But in all cases a corporation or incorporated company, being an artificial person, must have some writing to testify to its creation, and in the same or some other document must have more writing which defines its object and powers. "A corporation is always constituted for some particular purpose, for which only it exists, and the capacity of the corporation may accordingly be expressly defined and limited by the terms of the constitution; and if not so defined, its capacity may be impliedly limited by the purpose and object of its existence" (Leake on Contracts, pp. 581, 582). If the corporation is a company, incorporated under a general Companies Act, it will have a certificate of incorporation, which is the record of its creation, and a

memorandum of association, which defines its objects and powers.[1]

In the case of a company limited by shares, regulations for the government of the company, called articles of association, are optional, but are almost universal, and are drawn up before the formation of the company, and signed by the signatures to the memorandum of association, and are handed to the Registrar of Joint Stock Companies with the memorandum. Where there are no articles, table A of the Companies Act 1862 regulates the government of the company.[2] The memorandum and articles of association of a company registered under the Companies Acts are open to inspection at the Registry.

Power to Borrow.—Corporations and incorporated companies in general differ from ordinary partnerships, for, as has just been said, their powers are limited. When such a body becomes a customer of a bank and wants an advance of money, the banker must be careful to assure himself of his customer's power to overdraw his account, or borrow in some other form, as by the issue of debentures. Common law corporations, created by charter, and not under a general or special Act of Parliament, have, it is said, power to borrow even though no power of borrowing is to be found in the charter; but as these corporations are not often met with in the mercantile world, it is not necessary to discuss this. As for other companies, including both those registered under the Companies Acts and those formed under private Acts of Parliament, the rule is that an express prohibition against borrowing must be obeyed, but that where there is not an express prohibition, in the case of a company

[1] For a specimen memorandum of association, see Appendix C.

[2] A revised Table A, published in the *London Gazette* of 31st July 1906, is in force from 1st October 1906.

or society constituted for special purposes, no borrowing can be permitted without express authority, unless it be properly incident to the course and conduct of the business for its proper purposes (In re *International Life Assurance Society*, 1870, 10 Eq., 312). Accordingly, where there are no express provisions, a sharp distinction is drawn between trading and non-trading associations. A trading association, although its objects may be more limited than in the case of a private partnership, has, for the purpose of carrying out its objects, exactly the same powers that a private firm would usually and reasonably avail itself of in carrying on the same business. Thus, if the nature of the business demands it, it may draw, accept, and indorse bills of exchange, or arrange for an overdraft with its bankers, and give security for such overdraft in any usual way, and this without express power to deal with bills or to borrow money. Thus it has been held that a limited company, formed to carry on the manufacture of files, with express borrowing powers, limited to raising money by mortgage of its property, was not disabled from securing its overdraft at its bankers, which was a debt already incurred, by a deposit of its title-deeds. L.-J. Mellish said: "It would, in my opinion, be most undesirable to lay down a rule that no joint-stock company can raise money in this way. A mortgage by deposit is the kind of security most usually given by mercantile men to bankers, and such a rule would seriously cripple joint-stock companies in their business transactions" (In re *Patent File Co.*, 1870, 6 Ch. Ap., 83). In other words, a mercantile association is not, within the scope of its business, to be hampered because it is a company, and not a partnership.

With regard to express powers, it is of course possible for a trading company to take them so as to be able to

conduct its business in some unusual way; for instance, a railway company might take powers to draw, indorse, and accept bills of exchange, and then it would be perfectly legal for the company so to do. In the same way it is possible for non-trading associations to have express powers for such unusual purposes as borrowing or dealing with bills of exchange. But in both cases a banker should protect himself by inquiry as to the existence of such express powers.

Where money is being borrowed by a company within the limits of its powers of borrowing, there is no obligation on the lender to inquire for what purposes the borrowing is made, or whether the money borrowed is to be applied for objects within the powers of the borrowing company. (In re *Payne & Co.*, 1904, 2 Ch., 608.) In that case L.-J. Cozens Hardy said: "I do not think the point can be put better than it has been by Buckley J. He says, 'where the power is merely a general power to borrow, limited only, as it must be, for the purposes of the company's business, I think the matter is to be treated in this way, that the lender cannot investigate what the borrower is going to do with the money; he cannot look into the affairs of the company and say, "your purposes do not require it now, this borrowing is unnecessary; you must show me exactly why you want it."'"

Position of Lender where Borrowing ultra vires.—A banker who allows a customer who has no power to borrow to overdraw his account, will not be allowed to avail himself of the rule in Clayton's case, and will only be allowed to stand as creditor to the extent to which other creditors may have been rightly paid out of his advances.

The Blackburn and District Benefit Building Society was allowed by its bankers (Messrs Cunliffe, Brooks &

Co.), although it had no express power to borrow money, to make large overdrafts. The society carried on its business in the usual way by promising advances to members, but these advances being promised before sufficient subscriptions came in, the company was obliged to overdraw. Ultimately certain deeds were declared by the officers of the society to be deposited with the bankers as security for the balance of the account. It was admitted that part of the money was applied in payment of members withdrawing from the society, and the remainder in payment of salaries, legal expenses, and expenses of mortgaged property. The bankers claimed to retain the deeds until the overdraft was paid. It was held that the overdrafts were *ultra vires*, as not being properly incident to the course and conduct of the society's business for its proper purposes; that the bankers were not creditors of the society in respect of the overdrafts; but that they were entitled to hold the deeds as a security for repayment of so much only of the moneys advanced by them as was applied in payment of the debts and liabilities of the society properly payable, and had not been repaid to the bankers, excluding payments to withdrawing members; and lastly, that the burden of proving this lay on the bankers, and that in satisfying that burden the bankers could not have the benefit of the rule in Clayton's case. (*Blackburn Benefit Building Society* v. *Brooks*, 1882, 9 A. C., 857.) Where a company borrows money *ultra vires*, the lender, so far as the money is applied in the discharge of legal debts and liabilities of the company, is entitled to have the loan treated as valid, but he is not subrogated to any securities or priorities of the creditors who are paid by means of his money. (In re *Wrexham, Mold & Connah's Quay Railway Coy.*, 1899, 1 Ch., 440.) The facts of

that case well illustrate the important distinction thus drawn. The railway company had exhausted its borrowing powers, and not having sufficient net earnings to pay the interest warrants to the whole of its debenture stock holders, obtained an advance from the bank in order to complete the payments. The bank claimed to be repaid out of the next half-year's earnings before any interest warrants were paid in respect of that half-year. It was held that though the bank was entitled to stand as creditor, the actual user of its money having made the loan valid, yet the bank could not stand in the shoes of the debenture stock holders whose interest warrants had been paid out of its advance, and therefore had no priority over the debenture stock holders in the distribution of the next half-year's net earnings. For an application of the principle of the decision in the *Blackburn Benefit Building Society* v. *Brooks* to a case of principal and agent, where the agent has exceeded his authority, see *Bannatyne* v. *MacIver*, 1906, 1 K. B., 103.

A power taken by a limited company in its memorandum of association to borrow by the issue of debenture stock does not justify the issue of irredeemable debenture stock, for that is, in effect, the granting of perpetual annuities, and can only be done under an express power in that behalf. (In re *Southern Brazilian Rio Grande de Sul Railway Ltd.*, 1905, 2 Ch., 78.) In that case the market value of the debenture stock was above par, but the Court held that stock holders were only entitled in the liquidation to a return of the moneys actually paid to the company, together with interest.

Liability of Directors.—But in certain cases, even where the person lending to the company has no rights against the company, he may have equivalent rights against the directors, as the company's agents, on the ground of

warrant of authority. (*Firbanks Executors* v. *Humphreys*, 1886, 18 Q. B. D., 54.) In that case a contractor made a railway for a company, and did work for which he was entitled to be paid cash. The railway company not being in a position to pay cash, agreed to give the contractor debenture stock, and the directors issued and signed certificates for such stock. The directors did not know, but it was the fact, that all the debenture stock which the company was entitled to issue had been issued, and consequently that the contractor's debenture stock was an over-issue and valueless. The company went into liquidation, but valid debenture stock retained its par value. The directors were held liable on their implied representation that they had authority to issue valid debenture stock which would be a good security, and the damages awarded were the nominal amount of the stock which the contractor ought to have received under his agreement. L.-J. Lindley said that the contractor "could not know whether the company had or had not already issued the full amount of debenture stock which it was authorised to issue. He was justified in assuming that the directors had power to do what they did; and by giving to him the debenture stock certificates, they in truth represented to him that they had such power."

Inquiries before Dealing with Company.—The passage just quoted from the judgment of Lindley L.-J. in *Firbanks Executors* v. *Humphreys*, and a passage from Buckley J. cited in the case of In re *Payne & Co.* (1904, 2 Ch., 608, p. 127), both assume that the lender of money to a company cannot investigate the *internal* affairs of the borrowing company. But there are certain things which such a lender, or indeed any banker dealing with the company, must look into, and if he does not do so, any consequent loss falls on him. He is taken to

have notice of what has been called the *external* position of the company, viz. the contents of documents like the memorandum and articles of association, which are open to inspection by the public. But where the regulations laid down by these documents appear to have been complied with, it is not the duty of the lender to see that the apparent conformity is a real conformity. (*Mahony* v. *East Holford Mining Co. Ltd.*, 1875, 7 E. & I. A., 869.) The facts in that case were as follows. W., in concert with some friends and dependants, started a mining company. The memorandum and articles of association were duly registered. Subscriptions were obtained from intending shareholders and paid into the bank, which had been mentioned in the prospectus as the company's bank. The bankers received a formal notice, signed by the person who described himself as secretary of the company, that they were to pay the cheques signed by any two of the three directors whose names were given, and countersigned by the secretary himself, in accordance with a resolution "passed this day." The bankers from time to time, while the business of the company appeared to be going on, received cheques signed and countersigned as described, and duly honoured them. When the fund had been almost entirely drawn out, the company was ordered to be wound up. It then appeared that there never had been a meeting of the shareholders, nor any appointment of directors or of a secretary, but that the persons who had got up the company had treated themselves as directors and secretary, and appropriated the money obtained from the subscriptions. The liquidator claimed to recover from the bankers the amount of the cheques so drawn out. It was held that he could not do this. Lord Hatherley said as follows: "It is a point of very great importance that those who are

concerned in joint-stock companies, and those who deal with them, should be aware of what is essential to the due performance of their duties, both as customers or dealers with the company, and as persons forming the company and dealing with the outside world, respectively. On the one hand, it is settled by a series of decisions that those who deal with joint-stock companies are bound to take notice of that which I may call the external position of the company. Every joint-stock company has its memorandum and articles of association, . . . and those who deal with them must be affected with notice of all that is contained in those two documents. After that, the company entering upon its business and dealing with persons external to it is supposed, on its part, to have all those powers and authorities which by its articles of association and by its deed it appears to possess; and all that the directors do with reference to what I may call the indoor management of their own concern is a thing known to them, and known to them only; . . . a banker dealing with a company must be taken to be acquainted with the manner in which, under the articles of association, the moneys of the company may be drawn out of his bank for the purposes of the company. Those articles have been read, by which, in this case, the bankers were informed that cheques might be drawn upon the bank by three directors of the company. And the bankers must also be taken to have knowledge from the articles of the duties of the directors, and the mode in which the directors were to be appointed. But after that, where there are persons conducting the affairs of a company in a manner which appears to be perfectly consonant with the articles of association, then those so dealing with them externally are not to be affected by any irregularities which may take place in the internal

management of the company. They are entitled to presume that that of which only they can have knowledge, namely, the external acts, are rightly done when those external acts purport to be performed in the mode in which they ought to be performed. For instance, when a cheque is signed by three directors, they are entitled to assume that those directors are persons properly appointed for the purpose of performing that function, and have properly performed the function for which they have been appointed." This principle has been followed in two recent cases—*County of Gloucester Bank* v. *Rudry*, 1895, 1 Ch., 629, and *Owen and Ashworth's claim*, 1901, 1 Ch., 115.

A banker is not an officer of the company, in the sense that there is any duty cast upon him to see that any security he may take from the company for an overdraft is given in compliance with the articles (In re *General Provident Assurance Co.*, 1872, 14 Eq., 507).

Intervention of Debenture holders.—Special care should be taken in making advances to a limited company which has issued debentures by way of "floating security." (For the legal meaning of this term see pp. 140–1.) Even if the creditor obtains judgment and puts in execution he is not secure, for an execution creditor takes subject to all equities, and the sheriff cannot, by seizing, get rid of the rights of debenture holders to which the property was subject when in the hands of the debtor company (In re *Standard Manufacturing Company*, 1891, 1 Ch., 627). Recent decisions have gone further, and the practical result is very clearly set forth in the judgment of Buckley J. in the case of In re *London Pressed Hinge Company* (1905, 1 Ch., 576). The headnote in that case is: "Debenture holders, who have a floating security upon the undertaking and all the property, present and future, of a company, are entitled to the appoint-

ment of a receiver of the property subject to the debentures if their security is in jeopardy, although nothing is payable in respect of principal or interest, and there has been no default or breach of contract by the company." Buckley J. said: "The jeopardy consists in the fact that a creditor has issued a writ and signed judgment, and is in a position to issue execution. . . . The cases are numerous in which the undertaking of a limited company is so loaded with debentures that the profits are barely sufficient, and perhaps not sufficient, to keep down the debenture interest, and that, if the company is wound up, there is nothing for anyone but the debenture holders. In short, the facts often are that the undertaking is substantially carried on only for the benefit of the debenture holders, who have a floating security over it. In this state of facts money is lent or goods consigned to the company in respect of which a debt accrues to a creditor; and so long as the security floats, as it is termed, and no receiver is appointed, the creditor has a possibility or expectation of being paid by the company, for, as between the company and the debenture holders, the former may pay in the ordinary course of business. But directly a receiver is appointed, this expectation of the creditor is intercepted. He may have lent his money or consigned his goods to the company last week; but if he has the audacity to ask payment, and to enforce his legal remedies to obtain it, the debenture holder obtains a receiver in a proceeding to which the execution creditor is not a party, and thus closes the door against him, taking his money and his goods as part of the security, and leaving the creditor who supplied the money and the goods to go unpaid. I regret to be driven to the conclusion that, as the law stands, those are the rights of a debenture holder entitled to a floating charge."

In the same way it has been held that the appointment of a receiver by a debenture holder defeats a garnishee order, and the garnishor has no priority over the debenture holder (*Speissi* v. *Taylor*, 1905, 2 K. B., 658, and *Cairney* v. *Bach*, 1906, 2 K. B., 746).

Registration of Debentures.—Section 43 of the Companies Act 1862 provided for a register of mortgages and charges specifically affecting the property of a company, but such register was kept by the company, and an unregistered mortgage was a perfectly valid security. The only penalty for not registering was that the directors were liable to a fine. Something far more drastic was needed, and was supplied by sections 14 to 18 of the Companies Act 1900. A further strengthening of the law was made by section 10 of the Companies Act 1907. These latter provisions are now embodied in section 93 of the Companies (Consolidation) Act 1908. Registration is required in the case of (*a*) a mortgage or charge for the purpose of securing any issue of debentures, (*b*) a mortgage or charge on uncalled capital of the company, (*c*) a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale, (*d*) a mortgage or charge on any land, wherever situate, or any interest therein, (*e*) a mortgage or charge on any book debts of the company, and (*f*) a floating charge on the undertaking and property of the company.

The register is kept by the Registrar of Joint Stock Companies in a prescribed form, and is open to inspection.

Mortgages and charges must be registered within twenty-one days of their creation (subject to provisions for applying for an extension of time), and in default of registration they "shall be void against the liquidator and any creditor of the company," but without prejudice

to any contract or obligation for repayment of the money thereby secured. When a mortgage or charge becomes void under this section the money thereby secured immediately becomes payable.

The duty of registering charges rests primarily with the company, but any person interested therein may register the charge and recover the registration fees from the company. Every company shall cause a copy of every instrument creating any mortgage or charge requiring registration to be kept at the registered office of the company, where it is to be open to inspection by the members and creditors of the company in like manner as the register of mortgages under section 43 of the Companies Act 1862. Section 94 of the Act of 1908 must also be noticed. Under this section, if any person obtains an order for the appointment of a receiver or manager of the property of a company, or appoints such a receiver or manager under any powers contained in any instrument, he shall, within seven days from the date of the order or of the appointment under the powers contained in the instrument, give notice of the fact to the registrar, who shall on payment of the prescribed fee enter the fact in the register.

The Act of 1900 was the first Act in which the words "floating charge" occurred, and these words were not defined in the Act. The Court of Appeal, in a recent case, without attempting a precise definition, accepted the following rules:—a charge is a floating charge, within section 14 of the Companies Act 1900, (1) if it is a charge on a class of assets, both present and future; (2) if that class is one which, in the ordinary course of the business of the company, would be changing from time to time; and (3) if it is contemplated by the charge that, until some future step is taken by or on behalf of

the mortgagee, the company may carry on its business in the ordinary way so far as concerns the particular class of assets charged (In re *Yorkshire Woolcombers' Association Ltd.*, 1903, 2 Ch., 284).

It should be noticed that by section 212 of the Companies (Consolidation) Act 1908, where a company is being wound up, a floating charge on the undertaking or property of the company created within three months of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid, except to the amount of any cash paid to the company at the time of or subsequently to the creation of, and in consideration for the charge, together with interest on that amount at the rate of 5 per cent. per annum.

Thus, suppose a company is a customer of a bank which has allowed the company an overdraft of £10,000 either without security, or on some specific security such as a deposit of title deeds. The company asks for a further overdraft, and offers to secure the old and new debt by debentures giving a floating charge. A further £5000 is advanced, and two months later the company is wound up, and it is proved that it was insolvent when the bank received the floating charge. The floating charge will only be a security for £5000 and interest at 5 per cent. per annum, and not for the whole debt of £15,000.

Where a company has issued a series of debentures, but has omitted to register them within the twenty-one days allowed, it is competent to the company to cancel the issue, and to issue and register a fresh series of debentures, bearing a later date, in substitution for them (*Bowen* v. *Defries & Co.*, 1904, 1 Ch., 37). Care should be taken in receiving, as a security from a company,

debentures of the company which are being re-issued. The law on this point was materially altered by section 15 of the Companies Act 1907, which is now section 104 of the Companies (Consolidation) Act 1908. In cases not covered by section 104, the law stands as expressed in the two following cases. If the debentures have come back into the hands of the company by purchase, such purchase has in law extinguished the debt, and the debentures are of no legal effect (In re *Routledge & Sons Ltd.*, 1904, 2 Ch., 474). If the debentures were originally issued as a security for a loan which has since been paid off, their re-issue makes them a fresh issue, which may not be entitled to rank *pari passu* with the remaining debentures of the original issue (In re *Tasker & Sons Ltd.*, 1905, 2 Ch., 587, and In re *Perth Electric Tramways*, 1906, 2 Ch., 216).

Section 104 of the Act of 1908 enacts that, subject to certain exceptions, a company having redeemed debentures shall have power, and shall be deemed always to have had power, to keep the debentures alive for the purposes of re-issue, and shall be entitled to re-issue them with the same rights and priorities as if the debentures had not previously been issued. There are two exceptions, viz. (*a*) where the articles of association of the company or the conditions of issue expressly otherwise provide, and (*b*) where the debentures have been redeemed in pursuance of any obligation on the company so to do, not being an obligation enforceable only by the person to whom the redeemed debentures were issued or his assigns.

Where, with the object of keeping debentures alive for the purpose of re-issue, they have been transferred to a nominee of the company, a transfer from that nominee shall be deemed to be a re-issue.

Where a company has deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debit whilst the debentures remained so deposited. A re-issued debenture requires a fresh stamp, but this is not to prejudice the rights of a holder of a debenture which appears to be duly stamped, and who has taken it without notice that it was not duly stamped and without negligence.

Form of Instruments.—Under section 77 of the Companies (Consolidation) Act 1908 a bill of exchange or promissory note shall be deemed to have been made, accepted, or endorsed on behalf of a company if made, accepted, or endorsed in the name of, or by or on behalf of, or on account of, the company by any person acting under its authority. This section does not touch the power of the company to make, accept, or endorse such instruments.

With regard to ordinary trade contracts, it is not necessary that they should be made under the company's seal.

CHAPTER XIV

SPECIAL CUSTOMERS (MISCELLANEOUS)

Infants.—An infant is a person of either sex who is under twenty-one years of age. Under the Infants' Relief Act 1874 any contract for the repayment of money lent or to be lent is void. Bankers, therefore, should never allow an infant customer to overdraw his account.

Married Women.—Since the year 1882 marriage has ceased to vest the wife's property in her husband, either at the time of marriage or upon a subsequent acquisition of property by the wife, but her property may still be the subject of settlement. A married woman is now capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued in contract in all respects as if she were a single woman. Her contracts are deemed to be entered into by her with respect to and to bind her separate property, unless the contrary is shown. A married woman is liable whether or not she has separate property at the date of making the contract on which it is sought to make her liable. When a person has succeeded in getting judgment against a married woman, execution can only be levied upon her separate property. There is no personal remedy against the married woman,

nor are proceedings in bankruptcy available, unless the married woman is carrying on a trade.

Restraint on anticipation.—A man who has property, or even only a life estate, can sell or mortgage the property or the future income coming to him, and so far as any interest in the property or income remains in him, his creditors can make such property or income available for the payment of his debts. On the other hand, a married woman may have property (including her own) settled upon her subject to a restraint against anticipation, and then she cannot deal with the capital or the future income of it, but only the income actually in her hands, or due to her from the trustees, and her creditors' rights are limited in the same way.[1] When judgment is obtained against a married woman payable out of her separate estate held in trust for her without power of anticipation, income accrued due after the date of the judgment cannot be attached in the hands of the trustees to answer the judgment (*Bolitho* v. *Gidley*, 1905, A. C., 98).

A garnishee order served on her trustees will be confined to income due at the date of judgment. If this was not the rule, Lord Macnaughten said, "those who had ministered to her extravagance would find a security in a judgment against her of an anticipatory character, swooping down upon her property from time to time as and when received; and so the restraint on anticipation would be of no avail."

Husband and Wife.—A husband sometimes opens a banking account in the name of his wife, or sometimes in the joint names of himself and his wife; or, again, a wife may open an account in her own name, without saying whether she is acting as a principal or as her

[1] Under the Bankruptcy Act 1913 the Judge in Bankruptcy has a discretionary power to remove the restraint as long as sufficient provision is left for the bankrupt woman and her children.

husband's agent. A court of law can ascertain the real facts, and, for instance, on the husband's death, can declare that the balance of the account belongs to the husband's legal personal representatives, or is vested in the wife by right of survivorship, as the case may be. But while the account is a current account, the bank is justified in dealing with the actual customer, even if she is a married woman. (In re *Montague*, *ex parte Ward* v. *London and S. Western Bank*, 1897, 76 L. T., 203.) In that case it appeared that a wife opened a banking account, which, on a motion by the trustee in her husband's bankruptcy, was declared to be the husband's account. The banker had honoured cheques drawn by the wife after the receiving order had been made in the husband's bankruptcy, but before the Court's declaration. It was held that the trustee in the husband's bankruptcy could not recover the amounts as paid out by the banker, for the banker, being bound to honour the wife's cheques, had a good discharge.

Committees, etc.—Committees of clubs, councils of exhibitions, and other bodies of a like nature which are not incorporated are not legal persons, and are in general not partnerships. If, therefore, an account is opened in the name of any such body, and an overdraft is allowed, care should be taken to see that some definite persons are responsible. The committee as a whole cannot be made liable, nor is one member of the committee an implied agent for the other members.

Shareholders of the Bank.—Where the bank is a company, either under the Joint Stock Companies Acts or under the Companies Act 1908, it is competent for a person who is a shareholder to be at the same time a customer, and as such may sue the banking company, or be sued by it. The articles of association, or that

part of the deed of settlement which corresponds to articles of association, is a contract between the company and its shareholders, and it is usual to insert in the articles a provision giving the company a paramount lien on the shares of a shareholder for his debts to the company. The balance of an overdrawn account is a debt for which such lien attaches. After the company has received notice of the sale of the shares held by a customer, it cannot safely make fresh advances on their security (see p. 298).

Trustee in Bankruptcy and Liquidator of Company.—Both a trustee in bankruptcy and the liquidator of a company which is being wound up by order of the Court are now forbidden to pay official moneys into their own banking accounts. As a rule such money must be paid into the Bank of England, but by special leave it may be paid into a local bank, to a special account. All payments out have to be made by cheque payable to order, and every cheque is to have marked or written on the face of it the name of the estate, or the name of the company, as the case may be, and is to be signed by the trustee or liquidator, and be countersigned by at least one member of the committee of inspection, and by such other person, if any, in the case of a trustee, as the creditors or the committee of inspection may appoint, or, in the case of a liquidator, as the committee of inspection may appoint. (See the Bankruptcy Act 1883, ss. 74, 75, and General Rules 1886, rule 340, and the Companies (Consolidation) Act 1908, s. 154, and General Rules 1890, rule 81.)

Partners.—The law of partnership is now statute law. The Partnership Act 1890, so far as is important for the present purpose, enacts (s. 5): "Every partner is an agent of the firm and his other partners for the purpose

of the business of the partnership; and the acts of every partner, who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member, bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner"; and (s. 7) "where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound unless he is in fact specially authorised by the other partners."

It is not, in general, carrying on business in the usual way if one member of a partnership opens a banking account on behalf of the partnership in his own name, or in a name other than that of the firm. If such an account is overdrawn, the banker cannot recover the balance from the firm merely on proof that his customer was a member of the firm, and purported to be acting on its behalf; but he must show special circumstances relating to the particular partnership or trade, to show that the opening of such an account was within the ordinary course of the business (*Alliance Bank* v. *Kearsley*, 1871, 40 L. J., C. P., 249). If the business of the partnership is such as ordinarily requires the use of bills of exchange, a partner has full authority to draw, accept, and indorse them in the partnership name. He cannot bind the firm upon a bill, note, or cheque, except by using the partnership name. Where, however, the business carried on is not "a trade," it will not in general require the use of bills of exchange. Thus, in a very recent case, it was held that an auctioneer is not a trader, and a partner in a firm of auctioneers has no implied authority to bind the firm by his acceptance of a bill of exchange in the

firm name (*Whealty* v. *Smithers*, 1906, 2 K. B. 321). If a banker discounts for a customer bills drawn and indorsed in the partnership name, and obviously being used by the customer for his own private purposes, the banker is bound to ascertain the extent of his customer's authority, and if the dealing is not authorised, he cannot recover upon the bills against the firm, except to the extent to which the firm may be indebted to the individual partner (*Darlington District Joint Stock Bank ex p.*, 1864, 34 L. J., Bk., 10). If a partnership account is kept at a bank, on which each partner has a right to draw cheques, and the individual partners have also private accounts at the same bank, it is not the duty of the bankers to inquire into the propriety of any transfer of funds which may be made from and to the different accounts (*Backhouse* v. *Charlton*, 1878, 8 Ch. D., 444). When there is a change in the constitution or a transfer of business of the bank at which the partnership account is kept, it has been held that the acting member of the firm has implied authority to assent to the transfer of the account (*Beale* v. *Caddick*, 1857, 26 L. J., Ex., 356).

Limited Partners. — The Limited Partnership Act comes into force on 1st January 1908. The first point to note is that the limitation of liability conferred by the Act is entirely different in scope, though very similar in nature, to that constituted by the Companies Act, and that the title is to some extent a misnomer. The Act does not create limited partnerships in the sense that the Companies Acts create limited companies. The Act leaves untouched the principle of unlimited liability for debts as regards partnerships; but where one or more persons are responsible to an unlimited degree for the debts of the partnership, the Act enables a new class of

partners to be added whose liability is limited. It is an Act for creating partners, but not partnerships, with limited liability.

Section 4 of the Act enacts that "a limited partnership must consist of one or more persons called general partners, who shall be liable for all debts and obligations of the firm." These general partners are in exactly the same position as ordinary partners under the general law of the land. Section 4 of the Act proceeds to enact that a limited partnership must also contain "one or more persons, to be called limited partners, who shall at the time of entering into such partnership contribute thereto a sum or sums as capital, or property valued at a stated amount, and who shall not be liable for the debts or obligations of the firm beyond the amount so contributed."

A limited partner brings in a definite and limited sum as capital, either in cash or in property, and his liability is at an end when he has contributed the agreed amount. He is therefore very much in the position of a fully paid shareholder. On the same analogy his share capital must not be returned to him during the partnership, for section 4 further enacts that "a limited partner shall not during the continuance of the partnership, either directly or indirectly, draw out or receive back any part of his contribution, and if he does so draw out or receive back any such part shall be liable for the debts and obligations of the firm up to the amount so drawn out or received back." A limited partner must not take part in the management of the partnership business, and has no power to bind the firm; but he has the right to inspect the books of the firm, and to examine into the state and prospects of the partnership business, and he may advise with his partners thereon. If a limited partner takes

part in the management of the partnership business he is liable for all debts and obligations of the firm incurred while he so takes part in the management as though he were a general partner. A limited partner may, with the consent of the general partners, assign his share in the partnership, and upon such an assignment the assignee becomes a limited partner with all the rights of the assignor.

A limited partnership must be registered by sending to the registry for Joint Stock Companies a statement signed by the partners, giving particulars as to (*a*) the firm name; (*b*) the general nature of the business; (*c*) the principal place of business; (*d*) the full name of each of the partners; (*e*) the term for which the partnership is entered into; and (*f* and *g*) a description of every limited partner as such, with the sum contributed by him.

The provisions which directly affect the creditors of a limited partner or a limited partnership are as follows: (*a*) A limited partnership is not dissolved by the death or bankruptcy of a limited partner; (*b*) the enactments relating to bankruptcy apply to limited partnerships in like manner as if limited partnerships were ordinary partnerships, and on all the general partners of a limited partnership being adjudged bankrupt, the assets of the limited partnership shall vest in the trustee; (*c*) the other partners are not to be entitled to dissolve the partnership by reason of any limited partner suffering his share to be charged for his separate debt.

It is to be presumed that a creditor of a limited partnership will not be entitled to petition for a winding up of the partnership while any of the general partners remain solvent.

Joint Accounts.—Where money is paid into a bank on the joint account of persons not partners in trade, the

bankers are not discharged by payment to one of those persons without the authority of the others (*Innes* v. *Stephenson*, 1831, 1 M. & R., 145). And, in the same way, if bankers receive property for realisation on a joint account, they must hand the proceeds to all the persons from whom they received the property; if the bankers choose to pay the proceeds over to one only, and he misappropriates them, the bankers will be liable to make good the loss (*Magnus* v. *Queensland National Bank*, 1888, 37 Ch. D., 466). The most usual kinds of joint accounts are those of trustees, executors, administrators, and committees of various kinds.

Payment to Survivor.—"Upon the death of one of several joint creditors the legal right remains in the survivors, and upon the death of the last survivor, in whom the right has become solely vested, it devolves upon his personal representative, who only must sue at law. But, in equity, the survivor having obtained payment, may be accountable to the executor of the deceased" (Leake on Contracts, p. 453). Accordingly, when one of the persons who opened a joint account has died, a banker is justified in paying to the survivor or survivors. If the legal personal representative of the deceased gives notice to the bankers of an equitable claim, it is safest to obtain the concurrence of all parties.

In a recent case tried at the Birmingham Assizes in August 1906, in which it appeared that the bank manager took no notice of a letter from the executors of a deceased trustee, and the surviving trustee withdrew trust funds on deposit and misappropriated them, the jury found a verdict for the bank when sued by the persons entitled to the trust funds.

Trustees.—For special points relative to trustees' accounts, the reader may refer to pp. 112–116.

Executors.—An executor or administrator cannot, as a general rule, act until he has obtained probate of the will or letters of administration. A banker is not, however, bound to see that an executor or administrator has an absolutely good title. A *bonâ fide* payment made on the production of the probate or letters of administration is good, although the probate or letters be afterwards revoked. Nor is it the duty of the banker to see that such documents are sufficiently stamped.

An executor has no power to borrow money so as to bind the assets of the testator; he can only make himself personally liable (*Farhall* v. *Farhall*, 1871, 7 Ch. Ap., 123).

An executor has, however, power to give a lien on specific assets of the testator. It is therefore incumbent upon a banker who is asked to allow an overdraft by an executor to take as security assets of the testator, for, except by a lien on such assets, he will not be able to charge the testator's estate with such overdraft.

An executor may endorse bills and notes.

Co-executors being considered for many purposes as one person, one executor can bind another by certain acts, such as payment and release of a debt; but one cannot bind the others by contract.

Where a balance belonging to a testator is transferred to a fresh account in the name of the executors, that is to all intents and purposes a payment of the debt owed by the bank to the testator, and a loan of the balance by the executors to the bank. Cheques drawn upon such an account should be signed by all the executors, unless some express arrangement is made with the bank; for the honouring of such a cheque is no longer the payment of a debt due to the testator, for that has already been done once for all by the transfer to the new account.

If there is a sole executor who is also residuary legatee, the balance of the executorship account may, subject to the equities of other claimants, be treated as the executor's private money, and if such equities no longer exist, because all claims have been satisfied or provided for, so that the executor is alone beneficially interested in the balance of the account, it may be treated as his property in his individual account, as, for instance, by being set off against an overdraft on his private account (*Bailey* v. *Finch*, 1871, 7 Q. B., 34).

If a banker is privy to a breach of trust or misapplication of funds by an executor, and advances money on the security of the testator's assets, he acquires no better title against the estate than the executor himself, and the security will be held invalid.

Brokers and Agents.—The case of a payment by a customer into his account of a third person's money has already been considered, but there still remains the case of an agent dealing with his principal's securities.

Where the owner of property gives all the indicia of title to another person with the intention that he should deal with the property, the principles of agency apply, and any limit which he has imposed on his agent's dealing cannot be enforced against an innocent purchaser or mortgagee from the agent who has no notice of the trust (*Rimmer* v. *Webster*, 1902, 2 Ch., 163). The principle of agency referred to is the rule that a general agent has the general authority which attaches to his position, and the principal cannot limit this general authority by instructions which are not disclosed to third persons dealing with the agent. In *Brocklesby* v. *Temperance Building Society* (1895, A. C., 173), the agent had exceeded his powers of borrowing, but the principal was held bound. Lord Macnaghten said: "The case is reduced

to a very simple proposition. A person places his title-deeds under the control of an agent, and instructs the agent verbally to procure for him a certain sum of money by means of those deeds. The agent then obtains from a banker, on the security of the deeds, an advance in excess of the amount which the principal directed or intended him to raise, and misappropriates the difference. Who is to bear the loss? Is the principal to suffer for the fraud of his agent, or the banker, who, on the invitation of the principal, has dealt in good faith with the agent in the very matter entrusted to his agency. It would seem to be in accordance with common-sense that the loss should fall on the principal."

As soon as the banker has notice either of the actual limits of the authority given to the agent, or that the agent has a limited and not a general authority, he cannot safely make advances except to the extent of the agent's interest or authority. But even where the agent's authority is known to be limited, to the extent to which the money borrowed is in fact applied in paying the principal's debts, the lender is entitled in equity to stand in the same position as if such amount had been originally borrowed by the principal (*Bannatyne* v. *MacIver*, 1906, 1 K. B., 103).

Such notice may be an actual or an implied notice. (*Locke* v. *Prescott*, 1863, 32 Beav., 261.) In that case it appeared that bankers advanced to customers £300 to redeem some railway stock which had been transferred to another firm as a security for that sum. The stock was thereupon transferred in blank to the bankers. Subsequently the customers, in a letter to the bankers, stated that they had been requested by their principals to extend the term of the loan on the stock. The stock actually belonged to a third party. It was held that,

after the receipt of this letter, the bankers had notice of the third party's right to the stock, and no subsequent advances made by the bankers to the customers could affect the stock, and they could not hold it as a security for the floating balance of the customer's account.

The doctrine of notice, so far as regards implied notice, has twice been considered by the House of Lords. The earlier case was that of the *Earl of Sheffield* v. *The London Joint Stock Bank* (1888, 13 A. C., 333). In that case the information that the securities deposited were not the absolute property of the customer was held to be conveyed by the nature and extent of the customer's business. The action was brought by Lord Sheffield to redeem certain securities in the hands of three banks. It appeared that in order to raise a certain sum of money, on certain terms defined in writing, Lord Sheffield placed the securities in question at the disposal of one Easton, who procured the advance from Mozley, a money-dealer. Mozley divided the securities and deposited them in three lots, together with securities belonging to other customers of his, to cover his account with the several banks. Mozley eventually became insolvent. The banks knew that in most cases, if not in all, the securities which Mozley deposited with them were not his own absolute property; for Mozley's customers for the most part were persons on the Stock Exchange, and it was the usual practice for the banks on settling days to deliver out to Mozley the securities which he required to be released for the convenience of his customers, on an undertaking to re-deposit securities of equal value in the course of the day. The letters of deposit which Mozley gave the banks purported to charge, not merely Mozley's interest in the securities, but the securities themselves. The evidence for the bankers was, that such was the

general banking practice in accounts with brokers. The Court, however, held that there was no such general custom proved as would bind a client dealing with a money-dealer, unless it was shown that the client had notice of the practice, and dealt with the money-dealer on the footing of that practice. As such proof was not given in the case, the House of Lords held that, even though the banks had the legal title to the securities, they were not purchasers for value without notice, but ought to have inquired into the extent of Mozley's authority; and that, upon payment to the banks of the money advanced by Mozley to Easton, Lord Sheffield was entitled to the value of such of the securities as had been sold by the banks, and was entitled to redeem the remainder.

The effect of this decision was minimised by the decision of the House of Lords in the case of *London Joint Stock Bank* v. *Simmons* (1892, A. C., 201), in which it was stated that the decision of the House in the Earl of Sheffield's case just cited turned entirely upon the special facts of the case. In this subsequent case it appeared that a broker, in fraud of the owner, had pledged negotiable instruments, together with other instruments belonging to third persons, with a bank as a security *en bloc* for an advance. The bank did not know whether the instruments belonged to the broker or other persons, or whether the broker had any authority to deal with them, and made no inquiries. The broker having absconded, the bank realised the securities. It was held that there being, as a matter of fact, no circumstances to create suspicion, the bank was entitled to retain and realise the securities, having taken negotiable instruments for value and in good faith.

The case of *Bentinck* v. *London Joint Stock Bank*

(1893, 2 Ch., 120) was a somewhat similar case, but there the broker's principal was speculating, and some of his stocks and shares were carried over from one settling day to another. The principal had also executed transfers of some of the securities in order to facilitate the raising of money on them. It was held upon the evidence, especially having regard to that relating to the contango system, that there was nothing to lead the bank to suppose that the stocks and shares which were transferred to their trustees were not the broker's own property, and that the bank must therefore be treated as *bona fide* holders for value without notice. It was also held that, as to the stocks and shares of which the principal had himself executed transfers, he was precluded from denying that the brokers had authority to pledge them to the bank for their full value.

Bill-brokers.—It may be worth noting that the following arrangement has been held safe. A firm of bill-brokers sent bills to their banker under the terms of this guarantee:—"In consideration of your discounting for us any bills you may approve and think fit from time to time, we hereby guarantee the due payment of them as they respectively fall due." This arrangement was held to be equivalent to an indorsement on each bill by the brokers (*Bishop ex p.*, 1880, 15 Ch. D., 400).

CHAPTER XV

BANKER AS BAILEE OF VALUABLES

One of the functions of a banker at the present day is to take care of such of his customers' valuables as can be stored in a small space. This is generally undertaken by the banker without any special charge. The technical term for a person who is in possession of goods with the consent of the owner is "bailee," and the liabilities of bailees are well settled. But there is a great controversy as to whether a banker is to be regarded as a gratuitous bailee, in that he makes no special charge for his services, or as a bailee for reward, in that he makes a profit out of keeping his customer's account, and probably would lose the account if he refused to take care of valuables when so requested by his customer. The liability of a banker depends to some extent—not to a very large extent—on the decision as to which view is correct. The present writer regards the banker as a bailee for reward; but as the point is so uncertain, statements from both points of view are given below. The most serious argument against the view that a banker is a bailee for reward is that, if that is so, a customer can compel his banker to take care of his valuables; and if this result really followed, the Courts might well hesitate to adopt a decision which might in some circumstances

be very embarrassing to the banker. But the answer seems obvious: a banker can at any moment refuse to continue the account, except so far as there are outstanding cheques, etc. to be dealt with. The position on both sides is this: the customer can say, "If you don't take care of my valuables I will take my account elsewhere"; and the banker can say, "My strong-room is full; and if you insist on my taking care of your valuables, please take your account elsewhere." The continuance of the customer's account seems to the writer a present legal consideration sufficient to convert the banker into a bailee for reward, and to make the service rendered something more than a courtesy; and the legal consequences of this view seem consistent with the actual course of dealings between bankers and customers. The present writer agrees with the following quotation:—

"A banker is bound to take reasonable care of securities, plate, jewels, and other articles of value in small compass which are deposited with him by a customer, and to re-deliver them to his customer upon demand. If the articles are stolen or otherwise lost through the banker's negligence, or if he delivers them to a third person without being authorised to do so by his customer, he will be liable to make good their value.

"The care which the banker is bound to take is such care as an ordinarily efficient and prudent banker would take in similar circumstances. Any failure to display this degree of care will constitute negligence, for the consequences of which he will be responsible. But he does not insure the safety of the goods; and if, notwithstanding that he has displayed due care, the articles are lost, he will incur no liability to his customer" (Hart, 2nd ed., p. 599).

On the view that a banker is a gratuitous bailee, he is

theoretically only liable for "gross" negligence. "But, in fact, in this connection, gross negligence is a misnomer. For the duty to which he is bound, and for breach of which he may be liable, indicates a higher degree of care than is correlative with the common acceptation of gross negligence. He is bound, as a gratuitous bailee, to take the same degree of care of the goods as a reasonably prudent man, *with the same facilities at his disposal*, would take of goods of his own of the same description" (Sir J. R. Paget in Journal of the Institute of Bankers in Ireland, Apr. 1899, at p. 88).

The only actual authority is the case of *Giblin* v. *MacMullen* (1869, 2 P. C., 317), a case which came before the Judicial Committee of the Privy Council. In that case counsel admitted that the bankers were gratuitous bailees, but such an admission would not be made at the present day.

A banker who holds shares for his customer, and for a commission collects the dividends on them as they become due, is in the position of a bailee for reward (In re *United Service Company*, 1870, 6 Ch. Ap., 212).

Delivery to Wrong Person.—Just as a banker who pays his customer's money to the wrong person is in general liable to pay it over again to his customer (see p. 162), so a banker who delivers goods entrusted to his care to the wrong person is liable for their value to his customer. In such case the question of the banker's negligence does not arise. The banker is sued for what is technically known as the "wrongful conversion" of the goods.

Lien.—The deposit of securities for safe custody, or for collection of dividends, is a deposit made for a special purpose, inconsistent with the existence of the banker's lien for an overdrawn account.

CHAPTER XVI

BANKER AS PAYER OF CHEQUES AND BILLS

Payer of Cheques.—It has already been said that it is part of the special duty of a banker to honour his customer's cheques to the amount of his balance. The converse of this is true, except so far as it has been modified by statute, namely, that the banker is bound not to pay away his customer's money except upon his cheque or other order, and is liable to his customer for payments made to third persons if not authorised by the customer.

Customer's Signature.—A banker is bound to know his customer's signature. If the signature of the drawer of a cheque is forged, the banker cannot charge the customer, whose name is forged, with the amount of the cheque.

The only exception to this rule is when the circumstances are such that the customer is estopped or precluded from saying that the forged signature is not his signature. The doctrine of estoppel is so important in commercial transactions that it is worth while defining it with some care. "A representation concerning a matter of fact may be made to another, although without any expressed or intended warranty of the truth, yet with the intention of inducing him to act upon it, and if the latter act upon it, the party making the representation may be *estopped* from denying the truth of the representation, that is to say, he would be compelled to make it good, as if it were true" (Leake, p. 15).

Such representations of facts are as often made by conduct as by words. The rule as to estoppel has

therefore been thus stated: "Where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded (we now say 'precluded') from averring against the latter a different state of things as existing at the same time" (*Pickard* v. *Sears*, 1837, 6 A. & E., 469). It was on this principle that it was laid down that a person who knows that a bank is relying upon his forged signature to a bill of exchange, cannot lie by and not divulge the fact until he sees that the position of the bank is altered for the worse (*Mackenzie* v. *British Linen Company*, 1881, 6 A. C., 82). But there is no principle on which his mere silence for a fortnight from the time when he first knew of the forgery, during which the position of the bank was in no way altered or prejudiced, can be held to be an admission or adoption of liability, or an estoppel. It appeared in another case that some cheques were forged by one of the servants of the bank. The customer whose signature was forged was first informed thereof by the accredited agent of the bank, who requested his silence. The customer in complying with that request acted honestly, and with a view to what he believed to be the bank's interest. It was held that the silence of the customer was not a legal wrong to the bank, and that he was not estopped from relying on the forgery (*Ogilvie* v. *West Australian Mortgage and Agency Corporation Ltd.*, 1896, A. C., 257).

Payee's Indorsement.—At common law a banker was bound to know the signature of his customer's payee. Till the year 1853 cheques payable to order, on demand, were not often used, as they required the same stamp as a bill of exchange. In that year the stamp upon all such cheques was reduced by 16 & 17 Vict. c. 59

(Stamp Act 1853) to one penny; and as the effect of such reduction was likely to bring cheques payable to order into common use, it was further enacted by the 19th section of that Act that "any draft or order drawn upon a banker for a sum of money payable to order on demand which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker to prove that such indorsement, or any subsequent indorsement, was made by or under the direction or authority of the person to whom the said draft or order was or is made payable, either by the drawer or any indorser thereof."

Section 60 of the Bills of Exchange Act 1882 is to the same effect, but its language is somewhat different. "When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority." "A bill payable on demand drawn on a banker" is the definition of a cheque given by section 73 of the Bills of Exchange Act. It is only the banker on whom the draft, order, or cheque is drawn who is protected, *e.g.* if a cheque drawn on a foreign bank in London is for convenience marked on presentation for payment "accepted payable at Jones' bank" (Jones' bank being the English bank at which the foreign bank has a current account),

and is paid by Jones' bank, and is found afterwards to bear a forged indorsement, Jones' bank would not be protected by the section.

It is sufficient, in order to come within the Stamp Act 1853, that the cheque should purport to be indorsed by the agent of the person to whom it is drawn payable, even though the agent has no authority to indorse. In the case of *Charles* v. *Blackwell* (1877, 2 C. P. D., 151), it appeared that S. K., an agent of S. & Co., the plaintiffs, having authority to sell goods for them, and to receive payment by cash or cheque, but not having authority to indorse cheques, received from the defendants, in payment for goods supplied, a cheque on their bankers, drawn payable to S. & Co., or order. S. K. indorsed it "S. & Co., per S. K. agent," received the money from the bankers, and misappropriated part of it. The bankers returned the cheque to the defendants, and the amount was allowed in account by the defendants. The Court held that the payment by the bankers was within the protection of the above Statute, and that the plaintiff could not maintain an action against the defendants, either for the price of the goods or for the cheque.

It should be noted that the Statute only protects the banker: *e.g.* Jones draws a cheque payable to Smith's order; Jones' clerk steals the cheque, forges Smith's indorsement, and (with the cheque) buys goods of Robinson, who has no knowledge of the forgery; Robinson pays the cheque into his bankers, where his account is overdrawn, and Robinson's bankers receive payment of the cheque from Jones' bankers; Jones' bankers may debit Jones with the payment, but Jones may sue either Robinson or Robinson's bankers for conversion of the cheque (see *Ogden* v. *Benas*, 1874, 9 C. P., 513, and *Arnold* v. *The Cheque Bank*, 1876, 1 C. P. D., 578).

Form of Indorsement.—Certain statutory rules as to indorsement of bills (including cheques) are contained in sections 32 to 35 of the Bills of Exchange Act 1882, and will be found summarised in Chapter XXI. Some non-statutory usages and rules may be noticed. Section 32 (3) of the Act says that where a bill is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others. This does not apply to a dividend warrant, which may be indorsed by any one of the persons to whom or to whose order it purports to be payable. This usage is expressly preserved by section 97 of the Act. So also the signature of one executor is sufficient, but the indorsement must show that it is on behalf of the executors named on the face of the cheque. Trustees are not an exception to the rule, and must all sign. In the case of indorsements by agents, the indorsement must contain a statement of the agent's authority (compare section 26 of the Act). This statement is implied by the use of the abbreviations per pro or p.p. Thus p.p. John Smith James Robinson is a good indorsement of a cheque payable to the order of John Smith. As also the following would be: John Smith by James Robinson, attorney; for John Smith, James Robinson, agent. But the mere statement that John Smith is signing by James Robinson, or that James Robinson is signing for John Smith, is not sufficient. In the case of a company under the Companies (Consolidation) Act, a bill or cheque is indorsed on behalf of a company if indorsed in the name of, or by or on behalf or on account of, the company by any person acting under its authority (Companies (Consolidation) Act 1908, sec. 77). The usual mode is to sign per pro the company, with its correct name, adding

the signature of an officer of the company, and stating his office.

Post-dated and Stale Cheques.—A post-dated cheque put into circulation before its date is not a bill payable on demand, and strictly requires an *ad valorem* bill of exchange stamp. But the objection on the ground of insufficient stamping is not material, for when once the date on it is reached, a post-dated cheque may be sued on if it bears a penny stamp, as it is then on its face correctly stamped (*Royal Bank of Scotland* v. *Tottenham*, 1894, 2 Q. B., 715). As between a banker and his customer, the banker will not be justified in paying a post-dated cheque before its date. A post-dated cheque is not illegal as not being regular on the face of it (*Carpenter* v. *Street*, 1890, 6 T. L. R., 410).

Section 36, sub-section 3, of the Bills of Exchange Act 1882 runs thus: "A bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact." The practice of bankers is to honour cheques until they have been in circulation six months, or in some cases even up to a year. The effect of a cheque being "overdue" is that no person who takes it can acquire or give a better title than that of the person from whom he took it.

The drawer of a cheque is liable for a period of six years from the drawing of the cheque.

Marked and Certified Cheques.—In England it is customary for bankers to mark cheques as good for clearing-house purposes; but this is merely an arrangement between the bankers concerned in clearing the cheque, and the holder of the cheque is in no way privy to it.

In Canada and the United States there is a custom of certifying cheques, under which the banker on whom the cheque is drawn initials it before it is put into circulation. Unless a specific usage is proved, the only effect of the drawee bank initialling a cheque drawn upon it is to certify that it has funds of the drawer in its hands sufficient to meet its payment (*Gaden* v. *Newfoundland Savings Bank*, 1899, A. C., 281).

A certified cheque is subject to the ordinary rules as to the effect of a material alteration (*Imperial Bank of Canada* v. *Bank of Hamilton*, 1903, A. C., 49, cited below).

Material Alteration.—When a cheque is materially altered (Bills of Exchange Act 1882, s. 64) it becomes void. There is a partial exception where the alteration is not apparent, and the cheque is in the hands of a *bonâ fide* holder for value, in which case the holder may avail himself of the cheque as if it had not been altered, and may enforce payment of it according to its original tenor. Alterations of the date or the sum payable are material alterations. A banker cannot charge his customer with a payment made to the holder of a void instrument.

Recovery from Person Paid.—Though the banker cannot charge his customer with a payment made on a void instrument, he can recover the amount from the payee if notice of the mistake is given in reasonable time, and no loss has been occasioned by delay, but subject to certain exceptions. (*Imperial Bank of Canada* v. *Bank of Hamilton*, 1903, A. C., 49.) In that case it appeared that a cheque for 5 dollars, certified by the Bank of Hamilton's bank stamp, was fraudulently altered to 500 dollars, and paid by the Bank of Hamilton to the Bank of Canada, who were holders for value, under the mistaken belief that the cheque presented for payment

was in the same form in which it had been marked by them. The actual fact was not discovered till the next day. An action was brought by the Bank of Hamilton to recover 495 dollars from the Bank of Canada. It was held (1) that the Bank of Hamilton was at liberty to prove, as between themselves and an innocent holder for value, that the cheque had been fraudulently altered after it had been certified; (2) that no negligence was imputable to the Bank of Hamilton in cashing the cheque without examining the drawer's account; and even if it were, it did not induce them to treat the cheque as good; (3) that notice of forgery was unnecessary, and that the rule as to notice of dishonour will not be extended to other cases where notice of the mistake is given in reasonable time, and no loss has been occasioned by delay.

This is only a particular instance of a larger principle. "It is indisputable that if money paid under a mistake of fact is redemanded from the person who received it before his position has been altered to his disadvantage, the money must be repaid in whatever character it was received" (*Kleinwort* v. *Dunlop*, House of Lords, in *Times*, 16th July 1907).

In that case, two firms of bankers, Brandt and Kleinwort, were financing a rubber merchant, Kramrisch, on the security of various parcels of rubber. Dunlops were large purchasers from Kramrisch, and received orders from him to pay purchase moneys sometimes to Kleinwort and sometimes to Brandt. A payment which should have been made to Brandt was, by the mistake of a clerk, made to Kleinwort. Brandt made Dunlops pay them (see *Brandt* v. *Dunlop Rubber Co.*, 1905, A. C., 454) the amount as really ordered. Dunlops sought to recover their mistaken payment from Kleinwort. The latter's main defence was that by continuing to make

advances to Kramrisch after they had received the money in dispute, they had altered their position to their own disadvantage. At the hearing of the action, the jury negatived this contention, and the judge gave judgment in favour of Dunlops. The House of Lords upheld the correctness of this decision.

An exception to this rule is where the payee receives the money as agent and pays it away to his principal before notice of the mistake (*Continental Caoutchouc Co.* v. *Kleinwort,* 1904, 20 T. L. R., 403). Another exception is in the case of a bill of exchange: here, if the money has been received in good faith and an interval of time has elapsed in which the position of the holder *may* be altered, apparently the money, once paid, cannot be recovered (*London & River Plate Bank* v. *Bank of Liverpool,* 1896, 1 Q. B., 7). For the case of forgery of the drawer's signature, see pp. 176–7.

Negligence.—A customer may have so negligently conducted himself that he cannot be heard to say that a payment wrongly made by the banker was not a payment made on his account. This is called estoppel by negligence. Negligence, to amount to an estoppel, must be in the transaction itself, and be the proximate cause of leading the banker into mistake, and also must be the neglect of some duty which is owing to the banker or to the general public (see *Bank of Ireland* v. *Evan's Charities,* 1855, 5 H. of L. Ca., 389). As this rule is being constantly misunderstood, it will be further explained by a few illustrations.

1. In the case of *Arnold* v. *Cheque Bank* (1876, 1 C. P. D., 578), it appeared that a cheque was sent through the post from abroad, but no separate letter of advice was sent. It was held that it was not competent for the banker, who had received payment of the cheque on a forged indorsement, to give evidence that it was a usual and almost in-

variable practice amongst merchants sending large remittances from abroad to send, besides the letter containing the remittance, a letter of advice by the same or the next mail, on the ground that the alleged negligence was collateral only to the transaction giving rise to the action.

2. So, where the customer's confidential clerk had forged cheques, and the alleged negligence consisted in a failure to examine the pass-book and returned cheques, the examination of which would have led to the discovery of the earlier forgeries, and so prevented the later forgeries, it was held that the customer was not estopped from recovering from his bankers the amount of the forged cheques honoured by them. (Unreported case.)

3. The case which went furthest in the banker's favour was the case of *Young* v. *Grote* (1827, 4 Bing., 253). There a customer of a banker delivered to his wife certain printed cheques signed by himself, but with blanks for the sums, requesting his wife to fill the blanks up according to the exigency of his business. She allowed one to be filled up by her husband's clerk with the words fifty pounds two shillings, the fifty being commenced with a small letter, and placed in the middle of a line; and the figures 50, 2s. were also placed at a considerable distance from the printed £. In this state she delivered the cheque to the clerk to receive the amount; whereupon he inserted, at the beginning of the line in which the word fifty was written, the words "three hundred and," and the figure "3" between the £ and the 50. The bankers paid £350, 2s.; and it was held that the loss must fall on the customer.

The decision in *Young* v. *Grote* has been much commented on (see *Scholfield* v. *Earl of Londesborough*, 1896, A. C., 514, cited at p. 180; *Union Credit Bank Ltd.* v. *Mersey Docks and Harbour Board*, 1899, 2 Q. B., 205;

and *Bank of Australasia* v. *Marshall*, 1906, A. C., 559). In the latter case the Privy Council treated *Young* v. *Grote* as overruled by *Scholfield* v. *Earl of Londesborough*, at any rate so far as holding that the leaving of spaces in drawing a cheque which facilitate forgery was not such negligence as to create an estoppel. "The principles laid down in *Scholfield* v. *Londesborough* appear to their Lordships to warrant the proposition that whatever the duty of a customer towards his banker might be with reference to the drawing of cheques, the mere fact that the cheque was drawn with spaces such that a forger could utilise them for the purpose of forgery was not in itself any violation of that obligation."

Blank Cheques. — The actual decision in *Young* v. *Grote* may, however, be justified on a ground other than negligence giving rise to estoppel. In the case of *Union Credit Bank Ltd.* v. *Mersey Docks and Harbour Board*, the subject-matter of the action was a delivery order which had been signed in blank, and afterwards wrongfully filled in with the number 18 instead of 1. It was held that the bank, who had been defrauded, could not succeed in an action for conversion brought against the Board, since the bank had impliedly given authority to fill up the blank in the delivery order, and were now estopped from showing that that authority was limited. Bingham J. said: "The case of *Young* v. *Grote* appears to me to be still an authority for the proposition that where a customer of a bank entrusts another person with a signed cheque, and at the same time authorises that other to fill up the amount which the banker is to pay, the banker is entitled to debit the customer's account with the amount which may be filled in on the cheque, although the fact be that the customer limited the authority of the person to whom he entrusted the cheque

to an authority to fill it up for a less sum than that appearing on the face of the cheque; and I am unable to find any sufficient reason for distinguishing between an order for the payment of money and an order for the delivery of goods." With this case may also be compared the recent case of *Lloyds Bank* v. *Cooke* (1907, 1 K. B., 361). There a person signed his name on blank stamped paper, with the intention of being liable on a promissory note for a given amount. The authority thus given was exceeded, and it was held that the drawer was estopped, as against the payee who had *bonâ fide* made an advance on the security of the note, from setting up the authority actually given, and was liable to the amount expressed in the note.

Operation of Cheque.—A cheque does not operate as an assignment of the drawer's funds, nor is there any privity between the payee and the banker; and if the banker wrongly dishonours the cheque, the customer, and not the payee, is the person to sue the banker. (For the different rule in Scotland, see pp. 30–1.) It is possible for the payee and banker to make some special arrangement whereby privity is established between them, and then the payee can sue for breach of the contract so made.

Property in Cheque.—A cheque taken in payment remains the property of the payee only so long as it remains unpaid. When paid, the banker is entitled to keep it as a voucher till his account with his customer is settled. After that, the drawer is entitled to it as a voucher between him and the payee (*Charles* v. *Blackwell*, 1877, 2 C. P. D., pp. 162–3). In the provinces it is not customary for the banker to return cheques to the customer.

What is Payment.—Payment by a banker is complete as soon as he has laid down the money on the bank counter with the intention that the person to receive

payment shall take it up. (*Chambers* v. *Miller*, 1862, 32 L. J., C. P., 30.) In that case it appeared that a bank cashier paid a cheque, and while the recipient was counting the money discovered that the customer's account did not show sufficient assets. It was held that the cashier had no right to take back the money.

Where the paying bank and the receiving bank are the same, payment is sufficiently made by the appropriate book entries, subject to the possibility of revocation, as stated at pp. 98–9. Payment in this way is within the protecting sections of the Stamp Act 1853 and the Bills of Exchange Act 1882.

Cheques should be paid in the order of their presentation to the banker. There is no obligation to pay except within banking hours.

Countermand of Payment.—By the Bills of Exchange Act 1882, s. 75, it is enacted that the duty and authority of a banker to pay a cheque drawn on him by his customer are determined by (1) countermand of payment; (2) notice of the customer's death.

If a customer tears up a cheque, that is a sufficient countermand of authority to pay it. Thus, where a cheque was presented which had been torn in pieces and pasted on a sheet of paper, and the banker paid it without inquiry, on proof that the customer had torn it up and thrown it away, the banker was held liable for the amount.

And, generally, if suspicious circumstances are brought to a banker's notice, he is put on inquiry (*Scholey* v. *Ramsbottom*, 1810, 2 Camp., 485).

For the effect of the customer's insanity or bankruptcy see p. 108, and of the making of a garnishee order see pp. 108–9.

Fictitious Payees.—Section 7, sub-s. 3, of the Bills of Exchange Act 1882 enacts that where the payee is a

fictitious or non-existing person, the bill may be treated as payable to bearer, and the section applies to cheques as well as to bills of exchange. As regards bills, the leading case on this section is *Vagliano* v. *Bank of England* (1891, A. C., 157; see p. 182), where the names of real persons were used, but by way of pretence only. There have been three recent cases relating to cheques. (1) The clerk to a firm drew cheques payable to the order of Brett, and pretended that work had been done by Brett for the firm. There was no such person as Brett. The clerk appropriated the cheques and indorsed them, and Attenborough & Sons gave value for them in good faith. It was held that as Brett was non-existing, Attenborough & Sons might treat the cheques as bearer cheques (*Clutton* v. *Attenborough & Sons*, 1897, A. C., 90). (2) A cashier drew cheques to the order of customers to whom amounts were not due, or in excess of the amounts due. The clerk's principal then signed them. The cashier forged the indorsements and cashed them through a friend, who acted in good faith. It was held that the names of the payees were not used by way of pretence only, and consequently that the payees were not fictitious persons, and the cheques could not be rightly treated as bearer cheques (*Vinden* v. *Hughes*, 1905, 1 K. B., 795). (3) One Macbeth agreed to finance White on the strength of a story concocted by White that he had bought 5000 shares from Kerr at £2, 5s. a share, and had arranged to sell them to a syndicate at a profit of five shillings a share. Macbeth thereupon drew a cheque on the Clydesdale Bank for £11,250, payable to Kerr or order, and handed it to White. Kerr was an existing person, but had nothing to do with the shares. White forged Kerr's indorsement, and paid the cheque into his own account at the North and South Wales Bank. The bank credited

White with the amount, which was in due course received from the Clydesdale Bank. Macbeth sued the North and South Wales Bank for the £11,250 so received. Mr. Justice Bray distinguished the case from that of *Vagliano* v. *Bank of England* on the following ground: "Kerr was a real person, intended by the plaintiff, the drawer, as I have found, to be the person who should receive payment. It is a fallacy to say that Kerr was fictitious because he had got no shares and had never agreed to sell any to White. The plaintiff believed he had, and intended him and no one else to receive the money. It matters not, in my opinion, how much the drawer of the cheque may have been deceived, if he honestly intends that the cheque shall be paid to the person designated by him" (*Macbeth* v. *North and South Wales Bank*, 1906, 2 K. B., 718. Decision affirmed by the House of Lords, 1908 A. C., 137).

Many banks will not now cash such cheques as "Pay wages or order," unless they are presented by some person known to them, or are indorsed by the drawer.

Banker as Payer of Bills.—A banker is not bound to pay the bills which a customer accepts payable at his banker's (*Vagliano* v. *Bank of England*, 1891, A. C., at p. 157). But the acceptance of a bill by a customer payable at his banker's is an authority to the banker to pay the bill, even though there are not sufficient funds of the customer's in his hands. As a matter of practice, if the banker has sufficient funds of the customer, he will, as a matter of course, act on the authority. A banker who has agreed to pay a bill for his customer must do so; and a long course of dealing may amount to such an agreement, and then can only be departed from after notice to the customer.

Forgery of Drawer's Signature.—The drawee of a bill

is bound to know the drawer's signature. It is his fault if he writes his acceptance on a forged instrument, and it is his act of acceptance which sends the bill forward for payment to the banker (*Vagliano* v. *Bank of England*, 1891, A. C., at p. 158). If the banker pays the bill, he cannot afterwards recover the money from the holder on the ground that the name of the drawer was forged (pre Vaughan Williams L.-J., in *Sheffield Corporation* v. *Barclay*, 1903, 2 K. B., at p. 590).

Forgery of Indorsement.—The authority given to the banker is to pay the bill to any person who, according to the law merchant, can give a valid discharge for it. If the bill is payable to order, it is an authority to pay the bill to any person who becomes holder by a genuine indorsement; and if the bill is originally payable to bearer, or if there is afterwards a genuine indorsement in blank, it is an authority to pay the bill to the person who seems to be the holder. A banker cannot debit his customer with payment made to a person who claims through a forged indorsement. "In paying their customer's acceptances in the usual way, bankers incur a risk perfectly understood, and in practice disregarded. Bankers have no recourse against their customers if they pay on a genuine bill to a person appearing to be the holder, but claiming through or under a forged indorsement. The bill is not discharged; the acceptor remains liable; the banker has simply thrown his money away. That was the effect of the decision in *Robarts* v. *Tucker* (1849, 16 Q. B., 560). . . . The ground of the decision is now statute law" (*Vagliano* v. *Bank of England*, 1891, A. C., at p. 157).

Section 24 of the Bills of Exchange Act 1882 enacts that, "subject to the provisions of this Act, where a signature on a bill is forged, or placed thereon without

the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority. Provided that nothing in this section shall affect the ratification of an unauthorised signature not amounting to a forgery."

The statutory protection against forged indorsements only extends to cheques (Bills of Exchange Act 1882, s. 60, p. 162). If there are circumstances amounting to a direction from the customer to the bankers to pay the bill without reference to the genuineness of the indorsement, or equivalent to an admission of its genuineness, inducing the banker to alter his position, then the customer will be precluded from showing that the indorsement was forged. These rules, no doubt, in practice bear hardly on bankers, as they have no greater opportunities of knowing the indorsements of payees of bills than those of payees of cheques; but, as was said by Baron Parke (*Robarts* v. *Tucker*, supra), "If bankers wish to avoid the responsibility of deciding on the genuineness of indorsements, they may require their customers to domicile their bills at their own offices, and to honour them by giving a cheque upon the banker."

Mode of Payment.—Where a bill is left for payment, the presentment continues till the bill is called for; and if the bank receives sufficient funds from the customer, or on his behalf, a reasonable time before the bill is called for, the bank must pay the bill.

A banker is not bound to pay a bill after banking hours (*Whitaker* v. *Bank of England*, 1835, 6 C. & P., 700).

A banker, if he pays bills, is bound to pay bills in the order of presentation to him.

Capacity in which Payment is made.—It sometimes happens that a bill of exchange, in the course of passing from person to person, has been held by the bank at which it has been made payable, and has been endorsed by it and transferred to a subsequent holder. It is then a question whether the bank pays on behalf of the customer, or under its liability as indorser. The law on this point has been laid down as follows: "I think it is clear law that the holder of a bill indorsed to him by a bank at which the acceptor has made it payable may, if the bank choose to dishonour the bill, receive payment forthwith from the bankers in their capacity as indorsers. . . . It is clear to my mind that they meant to reserve to themselves the right to examine into the state of the accounts, and determine whether they would honour the bill or not. The bank might have said to the holder, 'We require a reasonable time to examine into the state of the accounts between us and the acceptor before we either honour or dishonour this bill; but in case we determine to dishonour it we shall be liable to you as indorsers; therefore, to save trouble, take your money; if we honour the bill you are paid; if not, we are taking it up as indorsers of a dishonoured bill'" (*Pollard* v. *Ogden*, 1853, 2 E. & B., 459).

Payment through Correspondent.—When a customer banks with a country bank, the customer sometimes accepts bills payable, not at his own bankers, but at the house of their London or other agents. In such a case, if the customer pays into his own bankers a sum of money under directions to transmit the same for the purpose of taking up the bill, then, upon the failure of such bankers, the right of the customer to recover the whole of the money depends upon whether the bank has or has not specifically appro-

priated and transmitted such money (see the cases set out at p. 107).

Material Alterations.—The law as to material alterations is the same for bills as for cheques. The Bill of Exchange Act, s. 64, enacts—(1) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised, or assented to the alteration, and subsequent indorsers: Provided that, where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor. (2) In particular, the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent.

The acceptor of a bill of exchange is not under a duty to take precautions against fraudulent alterations in the bill after acceptance. A bill for £500 was presented for acceptance with a stamp of much larger amount than was necessary, and with spaces left. The acceptor wrote his acceptance and handed the bill to the drawer, who fraudulently filled up the spaces and turned it into a bill for £3500. The acceptor, on being sued on the bill by a *bonâ fide* holder for value, paid £500 into Court. It was held that the acceptor owed no duty of precaution to the plaintiff, and was guilty of no negligence, and was entitled to judgment (*Scholfield* v. *Earl of Londesborough*, 1896, A. C., 514).

Special Directions.—If a customer's account is overdrawn and he has accepted bills payable at his banker,

and has made no special arrangement with the banker, the customer is liable to have any money he pays in applied by the banker to the reduction of the adverse balance. It is usual, therefore, when a customer wishes a particular sum to be applied for taking up a particular bill, to pay the sum into his account, with special directions to that end, and then the banker cannot apply the sum in any other way. A paid to a banking company a sum of £440 for the purpose of providing for three bills drawn by A upon the company's London bankers. A owed at that time more than £440 to the company, who, instead of applying the money according to his instructions, placed it to the credit of his account with them. The bill was refused acceptance; and while it remained unpaid in the hands of the holder, A became bankrupt. It was held that when the company refused to perform its contract it ought to have returned the money to A, and accordingly A's assignees were entitled to recover from the company the whole amount of the bills (*Hill* v. *Smith*, 1844, 12 M. & W., 618).

Upon the same principles, so long as the bank remains willing to carry out its side of the special contract, the customer or his assignees cannot demand back the money paid in specially. Thus, where a sum had been carried to a special account as security against bills not yet at maturity, drawn by the customer and discounted by the bankers, it was held that the assignees in bankruptcy of the customer could not recover that sum (*Chartered Bank of India* v. *Evans*, 1869, 21 L. T., 407).

In default of a special arrangement of the nature shown on p. 126, there is no privity between any of the parties to a bill, other than the acceptor, and the banker who has been furnished with funds for the payment of the

bill. Thus in one case the acceptor of a bill paid the amount to his bankers in order to meet the bill. On the day it arrived at maturity the acceptor died, and the bankers dishonoured the bill, which was returned to the drawers and subsequently paid by them. The drawers then filed a bill in equity against the bankers to make good the amount. It was held that, though the bankers were wrong in not paying the bill, the drawers were not the right persons to institute such a suit, as there was no privity between them and the bankers (*Hill* v. *Royds*, 1869, 8 Ex., 290).

Fictitious Payee.—A banker is in a much more favourable position in respect to a bill payable to bearer than in respect to a bill payable to order. In the former case the bank would be authorised to pay the amount to the person who was the holder, irrespective of his title. The Bill of Exchange Act 1882, s. 7, sub-s. 3, introduces a new rule which brings a class of bills payable to order within this more favourable rule. It enacts that "where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer." This section received an important interpretation in the celebrated case of *Vagliano Brothers* v. *Bank of England* (1891, A. C., 108). This case contains other points on the subject of bills of exchange, but here only a short summary of this side of the case is set out. Glyka, a clerk of Vagliano's, forged bills purporting to be drawn by one Vucina, and secured the genuine acceptances of Vagliano. The clerk selected for the name of payees the name of a firm of merchants at Constantinople, Petridi & Co., with whom Vucina had had business relations, and of whose existence Vagliano was aware. The bills were accepted payable at the Bank of England. The clerk stole the forged bills, forged indorsements of the payees, and received money

for the bills across the counter at the Bank of England. One question raised was, "Were Petridi & Co. fictitious persons within the meaning of the above clause of the Bills of Exchange Act?"

The House of Lords, by a majority, and overruling five out of six of the Lords Justices of the Court of Appeal, answered the question in the affirmative.

Estoppel by Negligence.—The law here is the same as in the case of cheques. The cases cited above on cheques, pp. 170–1, may be referred to, and the case of *Scholfield* v. *Earl of Londesborough* (1896, A. C., 514, p. 178).

A person accepted a bill in blank, and this was afterwards stolen from his drawer, and filled up and circulated by the thief. It was held that the acceptor was not estopped from setting up the true facts, and was not liable to the holder (*Baxendale* v. *Bennett*, 1878, 3 Q. B. D., 525).

Documentary Bills.—A documentary bill is a bill which, when presented for acceptance, is accompanied by documents of title to goods which are intended to serve as security for the payment of the bill. The usual "documents" are the bill of lading[1] (see p. 272), invoices, and the policy of insurance, but there may be, in the case of minerals, a certificate of analysis. (See further cases on pp. 208–214). Bankers are often requested to accept bills for their customers on such security. A banker does not take upon himself the risk of the bill of lading being a genuine document, and need only see that it is regular on the face of it. If the bill of lading turns out to be forged, the banker having paid the bill of exchange can recover the amount from his customer (*Woods* v. *Thiedemann*, 1862, 1 H. & C., 478, and *Ulster Bank* v. *Synott*, 1871, 5 Ir. R. Eq., 595).

[1] For forms of bills of lading and other shipping documents, see Appendix C, pp. 357–369.

CHAPTER XVII

BANKER AS COLLECTOR OF CHEQUES AND BILLS

So far, it has been assumed that the payments to the credit of a customer's accounts have been cash payments. As a matter of practice, in the case of private customers, many payments in will be of cheques, and in trade accounts of bills of exchange. The rule with regard to cheques has thus been laid down by the Court of Appeal: "When a customer pays a cheque to his bankers with the intention that the amount of it shall be at once placed to his credit, and the bankers carry the amount to his credit accordingly, they become immediately holders of the cheque for value, even though the customer's account is not overdrawn" (in re *Palmer*, 1882, 19 Ch. D., 409). This position gave rise, in the case of *Capital & Counties Bank* v. *Gordon* (1903, A. C. 240), to an unexpected decision by which the House of Lords drew a sharp distinction between the position (*a*) of a banker who is merely receiving payment for his customer, and a mere agent for collection, and (*b*) of a banker "when he receives payment of a cheque of which he is the holder for value." In the latter case the banker was held to be outside the protection given by section 82 of the Bills of Exchange Acts 1882, which runs as follows: "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment." The

essential facts of the case were very simple. The appellant banks credited a customer with the amounts of cheques as soon as they were handed in to his account, and allowed him to draw against the amounts so credited before the cheques were cleared. The customer had stolen the cheques. The true owner of the cheques sought to recover the amounts received by the collecting banks, as being his money. The House of Lords decided that the banks were not protected by the section quoted above. This decision was not acceptable to the banking profession, and has been nullified by subsequent legislation. By the Bills of Exchange (Crossed Cheque) Act 1906, it is enacted that a banker receives payment of a crossed cheque for a customer within the meaning of section 82 of the Bills of Exchange Act 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof.

The practice of bankers is not to sue the drawer of a cheque if it is dishonoured, but to return it to the customer, unless the customer's account is overdrawn; but their right to sue is not dependent on the state of the account.

A banker who receives a cheque for the purpose of collection is bound to use due diligence in getting it paid. If the cheque was drawn by another customer of the same banker, the inference is still that the banker only receives it as agent, to deal with it in the same way as if it had been a cheque drawn on any other banker. It is not the duty of the bankers, under such circumstances, immediately to tell the person presenting the cheque that they have not sufficient funds to honour it. The banker may take time to make inquiries, provided that he gives notice of dishonour within a reasonable time (*Boyd* v. *Emmerson*, 1834, 2 A. & E., 184).

If the banker, as collector of a cheque for a customer,

makes a special arrangement for the receipt of the money, he cannot afterwards assert his rights as banker of the drawer of the cheque (*Kilsby* v. *Williams*, 1822, 5 B. & Ald., 815, and p. 126).

What is Due Diligence?—The next question is, What is due or reasonable diligence when the collecting bank and the paying bank are not the same? In general, the banker has the day after his receipt of a cheque to present it for payment. If the two banks are not in the same town, the collecting banker is only bound to send it to his agent for presentment by the post of the day after that on which he has received it, and the agent has the following day to present it for payment (*Hare* v. *Henty*, 1861, 38 L. J., C. P., 302). In that case it appeared that a cheque upon a bank at Lewes was paid on a Friday morning into a bank at Worthing, by a customer of the Worthing bank, to the credit of his account with that bank. If the cheque had been presented at Lewes on Saturday it would have been paid. It was not presented there till Monday, when it was dishonoured. It was held that the customer had no cause of action against the Worthing bank for neglect of duty.

It is now the usual practice to send such cheques through the country clearing-house in London; and as long as that process does not consume more than the two days allowed, the customer cannot complain. Nor does the fact that presentment is in that way made through the post invalidate the presentment (*Bailey* v. *Bodenham*, 1864, 33 L. J., C. P., 252). For an unusual form of London cheques, see the case of *Forman* v. *The Bank of England* (1902, 18 T. L. R., 339), cited p. 100.

If the collecting bank, on receiving notice of dishonour, gives notice of dishonour to its customer on or before the day following that on which the cheque was dishonoured,

the bank is entitled, if it has credited the customer with the amount of the cheque, thereupon to debit him with such amount.

Receipt of Money by Bank.—It is a question of considerable importance to know when the collecting bank has received payment, so that its customer can charge it with the receipt of the money. If the collecting bank presents the cheque by an agent across the counter of the paying bank, payment is made to the bank as soon as the money has been laid down upon the counter by the cashier of the paying bank with the intention that the agent of the collecting bank should take it up (see pp. 173–4). So, where the agent is another bank, payment to the agent of the collecting bank (or even to a sub-agent) is payment to the principal, and the customer may charge the bank with the receipt of the money.

"It must never be forgotten that the moment a bank places money to its customer's credit the customer is entitled to draw upon it, unless something occurs to deprive him of that right," per Lord Lindley in *Capital & Counties Bank* v. *Gordon* (1903, A. C., 240, at p. 249).

Clearing-House Customs.—The usual mode in which cheques are passed through the country clearing-house seems to be this:—The collecting bank, A, forwards the cheque to its town agent, B. The town agent, B, sends the cheque to the clearing-house, where it comes into the hands of the London bank, C, printed on the cheque as the agent of the paying bank, D. This latter bank, C, does not at once give credit for the cheque, because it has no means of knowing the state of the drawer's account at its principals', D, but on the same day forwards it to its principals, D, the paying bank. If the cheque is honoured, the paying bank, D, at once instructs its London agents, C, to credit B with the amount. On the

receipt of this advice by C, the day's accounts are made up on the footing that the amount of the cheque is payable by C to B. As soon as the day's accounts are settled by the necessary drafts, B has been paid; and whether A, the collecting bank, gets the money or no, the customer is entitled to the amount of the cheque as against his banker, A. If the cheque is dishonoured, D, the paying bank, should return it at once to A, the collecting bank.

In London there is a special clearing-house for London bankers, and in provincial towns there are also clearing-houses on similar principles.

The following example is given to show what in practice has been held to be an irrevocable payment under the clearing-house system. The bankers at Newcastle have accounts at the branch bank of the Bank of England; and it is the practice that each banker, having previously ascertained that the bills, cheques, etc. on the other banks will be paid, hands them to the Bank of England for collection; and they accordingly, at 2 P.M., present the bills, etc. to the drawees, and a cheque is drawn upon the Bank of England by the drawees for the aggregate amount, which is then placed to the debit of the drawee's account with the Bank of England. If that bank is itself the holder of that bill, it is presented earlier in the morning to ascertain whether it will be paid, and if so, it is left with the drawee, and a credit note is given in exchange; and afterwards, upon the presenting of the cheques, this credit note is taken into account, and forms part of the sum for which the cheque on the Bank of England is given. The banks close to the public at 3 P.M., but the bankers' accounts with the Bank of England are kept open till 4; between 3 and 4 the bankers attend to correct mistakes and strike a final balance. It appeared in the case of *Pollard* v. *Bank of England* (1871,

6 Q. B., 623) that a customer of the Bank of England had paid into his account a bill which the Bank discounted, accepted payable at L. & Co.'s, another Newcastle banker. When the bill became due it was treated in the ordinary course, and allowed for in the cheque given by L. & Co. to the Bank of England. After the closing of L. & Co.'s bank, on the same day, it was discovered that the acceptor's balance was not sufficient to pay the bill, and that the acceptor had stopped payment. Thereupon, at 3.30 P.M., L. & Co. requested the Bank of England to take back the bill. This it did, under protest. At this time the Bank of England had already placed the amount of the bill to the debit of L. & Co. It was decided that the customer was entitled to have credit for the bill with the Bank of England. For unless the giving the cheque by L. & Co. was provisional, and subject to ratification in going over the accounts later in the day, it became the duty of the bank at once to transfer the amount of the bill from the account of L. & Co. to that of the customer; and this, in effect, they did. Such a transaction might, no doubt, by arrangement between the bankers, be provisional only, and subject to be set aside; but it was for the bank to show that such an arrangement existed, in order to divest the transaction of what would otherwise be its necessary effect.

It should be carefully remembered that there is a distinction between rectifying a mistake and revoking an act. Thus, if several cheques are presented across the counter, and the cashier adds the amounts up wrong and gives £1 too much, the mistake may be corrected; and so, if he gave a bad coin, the recipient may exchange it for a good one. But the cashier cannot revoke the whole transaction, and claim back the whole of the money on the ground that he had made a mistake as to the

customer's balance. So, in the clearing-house case we have just considered, the bankers could rectify mistakes, but they could not revoke payments except on an express agreement to that effect. But, so long as there is no communication with the party to be paid, the banker is free to correct his mistakes, and if he cancels a cheque or a bill by mistake, he can mark it "cancelled in error," and then, on the return of the note or bill in that state, the payee must treat it as uncancelled. The case of *Prince* v. *The Oriental Bank Corporation*, set out on p. 98, is an instance of this.

The custom of the London clearing-house is thus described in the *Dictionary of Political Economy* (vol. i. p. 306):—

"The desks of the banks are placed in alphabetical order, so that the clerks can pass round the room and deliver the 'charges' without confusion or risk of error. In describing the operations it is necessary to use technical terms, and to remember that the 'out' and the 'in' clearing comprise the same items, having regard to their presentation by one bank and their reception for payment by another. Thus, the 'out' clearing of each bank—*i.e.* the cheques, etc., for which each bank has to receive payment—becomes part of the 'in' clearing of every other bank—*i.e.* the cheques, etc., which every other bank has to pay. The 'out' clearing is taken down at the bank offices in sheets or books in separate 'charges,' according to the bankers drawn upon, whilst the 'in' clearing is taken down in the same way at the clearing-house by clerks who go there for the purpose.

"The first 'clearing' is held from 10.30 A.M. till 12 noon, all drafts having to be delivered at the desks by 11. The clerks receiving the 'charges' enter the items in their 'in' clearing-books, and cast them, agreeing the

totals with amounts placed on the back of the last cheque. When this is completed, the clerks leave the house, taking the drafts to their respective offices. No balances are struck for this clearing, the total of each 'charge' being carried forward to the beginning of the second clearing. This opens at 2.30 and continues until 4, when the last delivery must be made. The arrangements differ from those of the morning clearing only in the fact that the deliveries are continuous and frequent throughout the afternoon. At 4 the doors of the house are closed, and no more drafts can be presented. As soon as the last drafts have been dispatched from the banks, the 'out' books are cast close and sent down to the house, to be agreed with the 'in' books of the other banks. Differences in adding the figures together are rectified by the bank in error, but differences in items are altered by the 'out' clearers to agree with the 'in' clearers. Subsequently the difference may be reclaimed by production of the draft. Drafts refused payment are returned at any time during the afternoon by inclusion in the 'out' charges to the bank by whom they were presented. 'Returns' are also received at the house after the close of the clearing and up to 5 P.M. The totals having been agreed, the balance between the 'out' and the 'in' amounts is struck by each bank with every other one, and the last 'returns' are charged and allowed on either side. All these balances then form items in a general balance-sheet, which is prepared by the head clearer of each bank, and shows at foot the final balance which his bank has either to pay or receive. This balance is settled with the clearing-house by means of transfers made at the Bank of England between the clearing-house account and those of the various banks. Of course, if the final balance-sheets are all correctly made out, the total

of the transfers to the credit of the clearing-house will exactly equal the total of the amounts transferred from that account to those of the creditor banks. Errors are charged or credited to the banks in the next day's clearing."

Return of Country Cheques.—The practice is for one country bank which receives a cheque from another country bank which it does not intend to pay to return the cheque by return of post to the bank into which it has been paid. Failure to act on this may involve the bank in default in damages (*Parr's Bank* v. *Ashby*, 1898, 14 T. L. R., 563).

Crossed Cheques.—Some years ago the custom of crossing cheques grew up, and there was a long controversy both in the law courts and in Parliament as to the effect to be given to "crossings."

"The custom of crossing cheques arose long before they began to be drawn to order. Prior to 1853 it had long been usual for bankers' clerks, presenting cheques through the clearing, to stamp the names of their banks across the cheques as an indication of the channel through which they were presented. And as cheques were payable to bearer, the public themselves, as a sort of safeguard, adopted the practice of crossing the cheque with the name of the banker to whom they wished the payment to be made. When the drawer of the cheque desired the safeguard of having the cheque paid to some banker, but did not know who was the payee's or bearer's banker, or whether he had a banker at all, it became usual to cross the cheque with two lines and the words '& Co.' between them, to indicate that it was to be paid to some banker or another" (Loyd, p. 115).

In a case in 1852 (*Bellamy* v. *Marjoribanks*, 7 Ex., 389), it appeared that the payee altered the crossing of a cheque from "Bank of England" to the name of his

own bankers, who collected it and paid the money into the payee's private account. The money was really trust money, and the payee appropriated it. In the action against the paying bank for paying to a bank other than the Bank of England, as directed by the original crossing, the judge said that the effect of the crossing must not be misunderstood. It was no part of the cheque itself, but a mere memorandum; and where the name of one well-known bank was substituted for another, it was not a negligent act to disregard the first crossing. This decision caused great dissatisfaction in the commercial world, and this was increased in a subsequent case, when it was held that the paying bank might safely disregard even an unobliterated crossing. This decision made special crossings of no value. From an *obiter dictum* in the first case cited, it would probably have been held negligence for a paying bank to disregard the crossing altogether by paying to someone who was not a banker at all. Then began a struggle, lasting over twenty years, between customers on the one hand, who were striving to obtain an absolutely safe method of remitting money by cheque, and the bankers on the other hand, who had to handle an enormous number of cheques, and said they could not as business men attend to every special direction which might be indorsed on the face of a cheque. Acts dealing with crossed cheques were passed in 1856 and 1858, and again in 1876. This last Act is now represented, with one modification, by sections 76 to 82 of the Bills of Exchange Act 1882.

Before the effect of these sections is given, it may be well to state the definition of a cheque given by the Act. "A cheque is a bill of exchange drawn on a banker payable on demand" (sec. 73). "A bill of exchange is an unconditional order in writing addressed by one

person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand . . . . a sum certain in money to or to the order of a specified person, or to bearer" (sec. 3).

The Revenue Act 1883, section 17, somewhat extends the scope of this part of the Act. It enacts that "sections 76 to 82, both inclusive, of the Bills of Exchange Act 1882, and section 25 of the Forgery Act 1861, shall extend to any document issued by a customer of any banker, and intended to enable any person or body corporate to obtain payment from such banker of the sum mentioned in such document, and shall so extend in like manner as if the said document were a cheque: Provided that nothing in this Act shall be deemed to make any such document a negotiable instrument."

A banker's draft payable to order on demand, addressed by one branch of a bank to another branch of the same bank, and not crossed, is not a cheque within the meaning of sections 60 and 82 of the Act, because such a draft is not addressed by one person to another, nor is it within section 17 of the Revenue Act 1883, as it is not issued by a customer of any banker, but it is within section 19 of the Stamp Act 1853 (see p. 164), (*Capital and Counties Bank* v. *Gordon*, 1903, A. C., 240).

A cheque with receipt form attached, and a proviso that payment is only to be made conditionally on the receipt being filled up, is not within the Bills of Exchange Act, because it is not an unconditional order in writing (*Bavins* v. *London and South-Western Bank*, 1900, 1 Q. B., 270). In the Court of Appeal the question was raised whether section 17 of the Inland Revenue Act 1883 did not give the protection afforded by section 82 of the Bills of Exchange Act 1882, but the point was not seriously argued, as, on the facts, the bank was held to

have been negligent in the receipt of the money, as the indorsement did not exactly correspond with the payee's name. Where the order to pay addressed to the banker is unconditional, the presence of a receipt form on the cheque does not prevent it being a negotiable instrument (*Nathan* v. *Ogden Ld.*, 1905, 93 L. T., 553).

Sections 76 to 82 provide as follows:—

There are two sorts of crossing, general and special, both of which are material parts of the cheque (sec. 78). Except as mentioned below, the alteration of a crossing is a material alteration, making the cheque void (see p. 159). A cheque is crossed generally when two parallel transverse lines are drawn across it, either with or without the words "and Company" between such lines, and either with or without the words "not negotiable." A cheque is crossed specially when it bears the name of a banker across its face, with or without the words "not negotiable" (sec. 76).[1]

An uncrossed cheque may be crossed generally or specially by the drawer or the holder (sec. 77).

A cheque crossed generally may be crossed specially by the holder. The holder may, in any case, add the words "not negotiable" (sec. 77).

When a cheque is once crossed specially, such crossing becomes a material part of the cheque, and must not be altered or added to, except that the banker to whom it is crossed may again cross it specially to another banker for collection (secs. 77 and 78).

Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself. This is a safeguard against the dishonesty of the banker's own servants (sec. 77).

If a cheque is crossed specially more than once, the

[1] For specimens of crossings, see Appendix C, p. 333.

banker on whom it is drawn must refuse payment of it unless the second crossing is made by a banker to another banker as his agent for collection. Where the banker on whom a cheque is drawn, which is crossed more than once, wrongfully pays it, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid (sec. 79).

The banker is liable to the true owner of a cheque in case of loss if he pays a cheque crossed generally to any one but a banker, or a cheque crossed specially to any banker but the one to whom it is crossed, or to another banker as his agent for collection (sec. 79).

This liability to the "true owner" should be noted. As has already been explained, the paying banker is, in general, only liable to his customer.

There is a proviso in the Act that if the crossing has been obliterated, and there is no apparent crossing or apparent alteration, the banker paying the cheque in good faith and without negligence is not to be responsible (sec. 79).

A banker paying in good faith and without negligence a crossed cheque in the proper manner, is in the same position as if payment of the cheque had been made to the true owner of it; and so also is the drawer of the cheque, provided that the cheque has come into the hands of the payee (sec. 80).

The effect of crossing a cheque as "not negotiable" is to render a person who afterwards takes the cheque incapable of having or giving a better title to the cheque than the person from whom he took it (sec. 81).

A collecting banker who receives payment in good faith, and without negligence on behalf of his customer, of a cheque crossed generally or specially to himself, to which cheque the customer has no title or a defective title,

does not incur any liability to the true owner of the cheque by reason only of having received such payment (sec. 82).

This last paragraph has been the subject of several important decisions, some of which have been already noticed. Cheques credited to a customer as soon as handed in are now deemed to be collected on behalf of the customer, by virtue of the Bill of Exchange (Crossed Cheques) Act 1906. The case of *Capital & Counties Bank* v. *Gordon* (1903, A. C., 240) decided that the protection afforded by the section applies only to cheques crossed before they are received by the banker. A person cannot be a customer without some sort of an account with the bank (*Great Western Railway* v. *London & County Banking Coy.*, 1901, A. C., 414; see p. 93). The question of negligence has been considered in regard to the following facts. A cheque for £542 was drawn in favour of the plaintiff company or order, and crossed generally. The company's secretary indorsed the cheque with the name of the company followed by his own name and the word "secretary," and, without the authority of the company, paid the cheque into his account at the defendant's bank for collection. The secretary had never previously paid into his account a cheque drawn in favour of the company. The bank, without making any inquiry as to the authority of the secretary to deal with the cheque, placed the amount to the credit of the secretary, and collected the proceeds from the paying bank. It was held that the bank had not acted without negligence, and were liable to the company for the amount of the cheque (*Hannan's Lake View Central Ld.* v. *Armstrong & Co.*, 1900, 5 Com. Cas., 188).

Other Crossings.—The only crossings mentioned in the Act are "& Co.," with or without a banker's name, a banker's name, and "not negotiable." Other crossings

are in fairly common use, such as "a/c payee," or "for account of A. B." These are apparently used under the impression that the *paying* banker must observe them, and must in some way see that they are carried to the account specified, as well as paid either to a banker, or to the banker specially named. This liability is not recognised by bankers, and the machinery of the clearing-house is all against any such recognition. In fact, a paying banker has no means whatever of seeing what becomes of the money which he has paid. As regards the collecting banker, it was said in one case that such crossings amounted to nothing more than a direction to the banker to carry the amount to a particular account when they received it. A failure to do this might well be evidence of negligence on the part of the collecting banker. There is nothing to make these crossings material parts of the cheque, an alteration of which would necessarily be a material alteration of the cheque. A crossing thus, "Account of M. National Bank," does not amount to "words prohibiting transfer, or indicating an intention that the cheque should not be transferable," so as to make the cheque not negotiable within the meaning of section 8 of the Bills of Exchange Act 1882 (*National Bank* v. *Silk*, 1891, 1 Q. B., 435). In that case the opinion of the Court, though it was not necessary for the decision of the case, was that a cheque payable to order or bearer cannot be made "not negotiable" except by crossing it in the manner provided by section 76.

Collection of Bills.—When a banker receives bills from his customer, he may receive them in one of two charac ters—as a factor, or as a purchaser. In the first case he holds them as collecting agent, in the second he becomes at once the debtor of his customer for their price.

Where the banker receives the bills merely for collec-

tion, the bills, even when indorsed to him, do not become his absolute property, and on the bankruptcy of the banker, the customer may recover such as remain in specie in his hands. If, however, the banker, contrary to the faith of the understanding between himself and his customer, negotiates the bills, a person taking them *bonâ fide* and for value gets a good title, and the customer can only come in as a general creditor. The banker now, however, runs the risk of a criminal prosecution. The fact that the customer expects and is allowed to draw against the bills, whilst still remaining undue, does not make them the property of the banker, although the banker may have a lien to the extent of his advances (*Ex parte Barkworth*, In re *Harrison*, 1858, 2 De G. & J., 194). It follows, from what has been said, that if the bills were accidentally destroyed, without negligence on the part of the banker, the loss would fall on the customer.

Short Bills.—Bills remitted for collection are called "short" bills, and they are said to be entered "short" when they are treated in the banker's books as bills, and not as cash. A century ago it was said that it was the practice of bankers in London, upon the receipt of undue bills from a customer, not to carry the amount directly to his credit, but to enter them short, as it is called, that is, note down the receipt of the bills in his account, and the amount, and the times when due, in a previous column of the same page, which sums, when received, are carried forwards into the usual cash column (*Giles* v. *Perkins*, 1807, 9 East, 13).

But a banker, by entering a short bill as cash, cannot alter the nature of the bills, for that depends on the intention of the parties; and the entries in the banker's book not being admissible as evidence in his favour, cannot even be used to show the banker's intention.

It is the duty of a banker to show due diligence in presenting bills given to him for collection.

Bills remitted against Acceptances.—A merchant abroad sent drafts from time to time to his London correspondent for acceptance, under an authority for that purpose, and upon an understanding that the liabilities of the latter in respect of all such acceptances should be covered by means of bills payable in London, to be remitted to him from time to time. Under such an arrangement the presumption is, until an agreement to the contrary is shown, that the London correspondent was not intended or entitled to treat the bills so remitted as cash, or to discount them before maturity; and therefore it was held that two of such bills which were existing in specie in his hands at the time of his bankruptcy, and were not then due, did not pass to the correspondent's assignees, but were the property of the merchant abroad (*Jombart* v. *Woollett*, 1837, 2 My. & C., 389).

In a similar case, where the course of dealing was that the remitted bills should be discounted before they were due, and the bankers discounted a bill for £450 held against an acceptance of the same amount, and then went into liquidation, it was held that the customer was not entitled to the proceeds in specie, but could only prove for the amount as a debt in the liquidation. A strong opinion was expressed that if the remitted bill had remained in specie at the commencement of the liquidation, the customer would, on retiring the acceptance, have been entitled to have the bill returned to him (In re *Broad, ex p. Neck*, 1884, 13 Q. B. D., 740).

In a case where the bankers had refused to accept the drafts, but retained the remitted bills, it was held that the customer was entitled to recover the proceeds of the bills (*Seligmann* v. *Huth*, 1877, 37 L. T., 488).

In the case of the double insolvency of both the customer who drew the bill and the banker who accepted it, the holder of the accepted bill is entitled to the benefit of bills remitted by the customer to meet the accepted bill. This rule was laid down thus in *Ex p. Waring* (1815, 19 Ves., 345): "Securities held by a banker against his acceptances are available to the bill holders if both acceptor and drawer are insolvent."

Documentary Bills.—A banker who receives a bill for collection accompanied by a bill of lading, and presents the bill for acceptance, does not guarantee that the bill of lading is genuine (*Leather* v. *Simpson*, 1871, 11 Eq., 398). In that case it appeared that a bill of exchange drawn upon the plaintiff by his correspondent abroad against bill of lading was sent through the defendants, who were bankers, for presentation and collection. The bank presented the bill to the plaintiff with this memorandum: "The bank holds bill of lading and policy for 251 bales of cotton per *Mrs Cummings.*" The plaintiff accepted the bill without asking to see the bill of lading, and afterwards retired it before it was due, paid the money, and received the bill of lading, which proved to be a forgery. It was held that the memorandum did not amount to a guarantee by the bank that the bill of lading was genuine, and that the plaintiff had no equity to recover the money.

Documentary bills are often drawn in connection with letters of credit; and for further information as to these, see pp. 208–214.

Banker and Correspondent.—In the case of country banks, a banker is often employed by his customers to transmit bills for collection to a London or other agent. In such a case the London or other bank takes the bills subject to the directions of the country bankers, and not of

their customer (*Johnson* v. *Robarts*, 1875, 10 Ch. Ap., 505). In that case it appeared that the customers of country bankers paid in to the bankers a sum of money in bank notes, and also some bills of exchange, to be remitted to London in order to meet certain acceptances. The bankers sent to their London agents the bills and some bank notes, with a letter directing them to pay a certain sum of money, also giving them notice of the acceptances as payable at their bank, and giving directions as to other business. The country bankers stopped payment, owing a large balance to the London bankers. It was held that, as between the country customers and the London bankers, there was no appropriation of the bills and notes to meet the acceptances, and that the London bankers could retain the bills and notes without meeting the acceptances.

Discounting Bills.—To discount a bill is only another name for to purchase it. On discounting a bill the property passes to the banker, and the customer can at once sue for the price, or draw it from his account by cheques. It would be very unusual for a banker to discount a bill which his customer had not indorsed; and so, if the discounted bill is dishonoured, the banker can claim its amount from the customer as indorsee.

A banker has full power to deal as he pleases with a discounted bill.

Foreign Bills.—It is very usual for a banker to refuse to discount foreign bills except upon the security of the goods in payment of which the bills were drawn; this will be further gone into when the taking of security is considered. That is to say, a banker will discount foreign documentary bills, but not other foreign bills.

Marginal Notes.—There is one arrangement which will be mentioned at once, and that is the practice of

giving "marginal notes." When the whole of the price of bills is not paid or credited as cash, but a percentage kept back, which is to bear interest, but only to be payable when advice of the due payment of the bills has been received, and then is to be subject to any other claims of the bankers against the customer, such percentage retained is a margin, and the document expressing the arrangement is called a marginal note. An example is subjoined:—

CHARTERED BANK OF INDIA, AUSTRALIA, AND CHINA.

LONDON, 21*st February* 1873.

Bills Nos. 426, 427, for Rs. 839, 13a. 0p., purchased at 1s. 11§d., ...	£79	3	5
Paid this day, ...	59	3	5
Leaving a margin of twenty pounds, .	£20	0	0

to be accounted for to Messrs Fastnedge & Co., on receipt of advice of the due payment of the above bills, and after providing for any deficiency or other liabilities of the said parties to the bank. Interest to be allowed at Bank of England minimum rates, but not to exceed 5 p. c. p. a.

J. H. SMYTHE, *Manager.*

Such a debt is only a contingent debt, and is not meant to be transferable (*Ex p. Kemp*, 1874, 9 Ch. Ap., 383).

These documents were chiefly given by Indian banks, and are not now very often seen in London.

CHAPTER XVIII

BANK INSTRUMENTS

This chapter will deal with those commercial instruments, other than bank notes, which are either exclusively or very usually issued by bankers, viz. bank post bills, letters of credit, and circular letters.

Bank Post Bills.—A bank post bill is a bill of exchange drawn and accepted by a bank, and not payable on demand. The only London bank which issues them is the Bank of England. They are generally issued at seven or sixty days. The following is an example of one of their bills:—

No. 1. London, 1*st November* 1878.

At seven days' sight I promise to pay this my sole Bill of Exchange to A. B. or order, five hundred pounds sterling.
Value received of Messrs C. D. & Co.

Accepted, 1st November 1878.
E. F.

For the Governor and Company of the
Bank of England,
G. H.

The bank post bills of foreign banks are slightly different in form, and another example is given:—

No. 445.—Union Bank Post Bill.

Calcutta, 1*st July* 1847.—Company's rupees, 10,000.—At sixty days after sight of this our first Bill of Exchange, second and third of the same tenor and date not paid, we promise to pay on account of the proprietors of the Union Bank of Calcutta, to the order of Messrs Cockerell, Larpent & Co., the sum of Co.'s rups. 10,000, value received.

J. Renier,
W. P. Grant, } *Directors.*

These instruments are bills of exchange rather than promissory notes, and require acceptance. They take no days of grace. In 1855 it was said that the issue of such bills was an approved mode of doing business and was a most beneficial practice, and that such bills had been in use by the Bank of England for a century at the least.

Irish bank post bills take days of grace.

Deposit Receipt.—The receipt of money deposited with a banker, withdrawable upon so many days' notice, is often evidenced by a "deposit receipt."[1] It is very usual for the receipt form to bear some such notice as this: "This deposit receipt is not transferable." But, even without any such words, the better opinion seems to be that the debt created by the deposit of the money is only transferable in the same way as other debts (see p. 226), and does not pass by indorsement and delivery of the deposit receipt. In the case of *Pearce* v. *Creswick* (1843, 2 Hare, 286), it was said, "the defendants do not pretend that the receipts were transferable in the sense that the holder was entitled to demand payment"; and In re *Dillon*, *Duffin* v. *Duffin* (1890, 44 Ch. D., 76), L.-J. Lindley said, "it is not a negotiable instrument." The only authority to the contrary is the case of *Woodham* v. *Anglo-Australian, etc. Insurance Company* (1861, 3 Giff.,

[1] For a form of deposit receipt, see Appendix C, p. 351.

238), where it was said: "This is not a case of the assignment of a chose in action: a deposit note for money, like a deposit note for goods, passes by delivery of the instrument, and requires no assignment." As this case seems never to have been followed, it is not safe to act upon it.

The banker must pay the person actually entitled to the money, who is not necessarily the person who presents the deposit receipt (see *Evans* v. *National Provincial Bank of England*, 1897, 13 T. L. R., 429).

Some deposit receipts bear a form of cheque on the back. This was characterised in the case of In re *Dillon*, supra, as "merely an arrangement by the bankers to enable them more conveniently to preserve evidence of the money having been withdrawn."

In the same case it was also said that the cheque of another person, a promissory note, and an ordinary deposit note are good subjects of a *donatio mortis causâ* (*i.e.* gift in view of and conditional on the donor's death). A banker has a lien on money standing to the credit of a deposit account for an adverse balance on the current account.

Letters of Credit.[1]—Commercial letters of credit are of two kinds, according as they authorise the drawing of cheques or promise the acceptance of bills. In any case they are handed to the customer by the bank granting them, and are shown by the customer to the persons who are requested to give credit on the faith of them. The object of the first kind is generally the transmission of money, that of the second kind the guaranteeing of bills of exchange.

The nature of letters of credit for the transmission of money will be best gathered from an example. A, in

[1] For forms, see Appendix C, pp. 352–3.

Glasgow, wanted to pay B, in Liverpool, £460, 9s. A accordingly paid that sum into the Union Bank of Scotland, and obtained from them a letter of credit, addressed to the X bank at Liverpool, in these terms:—"Please to honour the drafts of B to the extent of £460, 9s., and charge the same to the account of our bank." This was posted to B, and the letter containing it was, in the absence of the heads of the business, opened by a clerk, who forged a cheque for the amount, presented the cheque and the letter, received the amount, and absconded. A sought to recover from the Union Bank the payment he had made to them. In the judgment the following rules were laid down:—

A letter of credit is an authority to make the payment indicated by it. Such a payment can only be proved by showing that there has been a draft by the person authorised to draw, and that such draft has been paid.

Payment of a forged draft is no payment as between the person paying and the person whose name is forged; but as, through such a payment, the person to whom the letter is addressed may get possession of it, the mere possession of the letter by such person is not a proof that a valid payment has been made.

As the person presenting the letter of credit is not necessarily the person entitled to make the draft, the bankers to whom the letter of credit is addressed are bound to do more than demand to see the letter of credit; they must see that the signature to the draft is genuine, or the loss will be their own.

When, for a sum paid down, a banker grants a letter of credit, he must show that it has been complied with, or pay back the money; and he cannot refuse to pay back the money on the ground that the letter of credit has not been returned to him.

A letter of credit is not a negotiable instrument, and the rules applicable to negotiable instruments do not apply to it.

On these grounds the Court held that A could recover from the Union Bank the amount he had paid to them. These rules contain, for practical purposes, the whole of the law on that class of letter of credit (*Orr* v. *Union Bank of Scotland*, 1854, 1 Macq., 513).

Open and Documentary Credits.—Letters of credit which promise the acceptance of bills of exchange often have blank forms of bills printed on the margin of the letter, and then they are called marginal letters. The following is an example:—

*No. 39.

Credit for £2000 sterling in duplicate, 4907.

11325 NATIONAL BANK OF SCOTLAND, EDINBURGH, 24*th June* 1864.

To Messrs Fletcher & Company, China.

I hereby, for the National Bank of Scotland, authorise you to draw the annexed Bill of Exchange at six months' sight for Two thousand pounds sterling on Messrs Glyn & Co., bankers, London, who will honour the same in conformity with its tenor, if presented, along with this letter of credit, within one year from this date.

(Signed)

THOMAS ANDERSON, *Secretary.*
JNO. J. SHEARER, *p. Manager.*

First of Exchange for £2000 sterling.

No. $\frac{39}{4907}$ F.

Place and date of drawing—

SHANGHAI, 5*th April* 1865.

Six months after sight pay this first of Exchange (second of the same tenor and date not being accepted or paid), to our order, the sum of *Two thousand pounds sterling*, which charge to the National Bank of Scotland, as per annexed Letter of Credit.

To Messrs Glyn & Co., Bankers, London.

(*Drawer signs here*)
FLETCHER & Co.

A letter of credit may contain an absolute promise, on the part of the bank issuing it, to accept bills up to the limit indicated; or it may contain a promise conditional on the remittance of bills of lading, usually with invoices

and insurance policies attached, or some other form of security. If the promise is absolute, the letter is generally called an open or clean credit; if the promise is conditional on the remittance of bills of lading, it is generally called a documentary credit.

The object and nature of a documentary letter of credit have been thus stated: "A, a merchant in Liverpool, wants to buy some cotton in Pernambuco. In the ordinary course of things he would write out to persons at Pernambuco, and request them to buy the cotton, and draw bills on himself for the price. But the parties may wish to take a different course. A may be a most respectable and solvent person, but, at the same time, it is thought desirable that there should be some name brought into the transaction for the purpose of using it in the Pernambuco market,—some name perfectly well known there, whose credit is such that every person would accept it, provided only you can assure the merchant to whom you want to offer the bills drawn on that person that the bills will be accepted when they get home. How is that to be accomplished? There is a bank at Liverpool which has a great reputation, B's bank, and A knows that if he can get a letter from B's bank saying that these bankers will accept the bills when they come home, he can send that letter to his correspondents at Pernambuco, and they will be able to show it to any merchant to whom they might offer the bills to pay for the cotton, and the letter of credit so shown will be a certificate that the bills will be accepted when they come home, and so the bills will pass as current as if they were accepted bills. The letter of credit must contain, besides the promise to accept, for the protection of the bankers orders to those who are dealing with the cotton as to how they are to send home the shipping documents

relating to the cotton. These orders are distinct from the promise, and are not for the protection of the bill holders." It follows from this, that if the bank, after accepting the bills, stops payment, and the goods are stopped before they come into the hands of the bank, the bill holders cannot come in as creditors for the whole of the amount of the bills, but can only claim for the surplus remaining after the goods consigned have been applied to satisfy the acceptances (*Banner* v. *Johnston*, 1871, 5 E. & I., 157).

The object of letters of credit is then, shortly, to substitute the credit of a well-known bank for that of a private merchant, and this will not be effectively done (*a*) unless there is privity between the bill holder and the bank, and (*b*) unless the credit is given irrespective of the state of the accounts between the bank and its customer, the private merchant.

It has accordingly been held that where a letter of credit containing an offer to accept bills is intended, either expressly or as a matter of fair presumption, to be shown to third persons for the purpose of obtaining advances, then, upon such third person advancing money on the faith of the letter, the offer of the banker contained in the letter is turned into a contract between the banker and the person making the advance, and the latter is entitled to sue the banker if he does not accept the bills according to his promise (In re *Agra & Masterman's Bank*, 1867, 2 Ch. Ap., 391).

Bills negotiated under letters of credit will in general be payable irrespective of the state of accounts between the banker and the grantee of the letter. It appeared in the case just cited that Agra & Masterman's bank addressed to D. T. & Co. a letter in these words: "No. 394. You are hereby authorised to draw upon this bank

to the extent of £15,000, and such drafts I undertake duly to honour on presentation. This credit will remain in force twelve months from its date, and parties negotiating bills under it are requested to endorse particulars on the back hereof." D. T. & Co. drew bills under this letter to the amount of £6000, and indorsed them to the Asiatic Banking Corporation. The bank was afterwards ordered to be wound up, and as D. T. & Co. were indebted to the bank to an amount exceeding what was due on the bills, the bank claimed to set off their claim against D. T. & Co. against the claim of the Asiatic Banking Corporation, on the ground that the corporation being the equitable assignees of the benefit of a contract between the bank and D. T. & Co., must take subject to the same equities as their assignors—that is, subject to the state of account between the bank and D. T. & Co. Earl Cairns said: "The letter is a general invitation issued by the Agra & Masterman's Bank, through D. T. & Co., to all persons to whom the letter may be shown, to take bills drawn by D. T. & Co. on the Agra & Masterman's Bank with reference to the letter, and to alter their position by paying for such bills, with an assurance that, if they or any of them will do so, the Agra & Masterman's Bank will accept such bills on presentation. . . . Upon the offer in this letter being accepted and acted on by the Asiatic Banking Corporation, there was constituted a valid and binding legal contract against the Agra & Masterman's Bank in favour of the Asiatic Banking Corporation. . . . But, assuming the contract to have been at law a contract with D. T. & Co., and with no other, it is clear that the contract was in equity assignable. . . . Generally speaking, a chose in action assignable only in equity must be assigned subject to the equities existing between the original parties to the contract; but

this is a rule which must yield when it appears from the nature or terms of the contract that it must have been intended to be assignable free from and unaffected by such equities. The essence of the letter is, that the person taking bills on the faith of it is to have the absolute benefit of the undertaking in the letter, and to have it in order to obtain the acceptance of the bills which are negotiable instruments payable according to their tenor, and without reference to any collateral or cross claims. Unless this is done, the letter is useless."

If the letter contains conditions or orders which are capable of performance before an advance is made, a person making an advance must see that they are performed, or the person giving the letter of credit will be entitled to refuse acceptance of the bills (*Union Bank of Canada* v. *Cole*, 1877, 47 L. J., C. P., 100). In that case the letter was addressed to the grantee alone, and very long conditions were annexed, the general effect of which was as follows: "When goods have been shipped under the credit, you may draw bills against the shipping documents, and we will accept them. When the goods are not shipped, on giving us the security of the wheat in respect of which you wish to make disbursements, you may also draw bills, without attaching them to the shipping documents. But in that case we shall still have the security of the grain to be shipped; for, in the meantime, the property thus represented is to be held in trust for the givers of the credit as collateral security." The grantee drew a bill on the security of wheat coming to him in the course of business, but not otherwise defined, and not coming within the terms of the letter. The bill was then negotiated to a person who had notice of the conditions, and knew that they had not been fulfilled, and was sent by him to England for acceptance. The accept

ance was refused. The Court held that this refusal was justifiable, as either the directions and conditions showed that the letter was not intended to be shown to and acted on by third parties, or, if the letter was intended to be shown, there was no liability unless such of the conditions as could possibly have been fulfilled when the negotiation took place had then been fulfilled. In this case L.-J. Brett was careful to say: "It does not follow that where the letter is not addressed to the public there may not arise a contract between the person who acts upon and the person who signs the letter."

In another case, a letter of credit was addressed by the defendants to K. & Co., merchants in Batavia, in which the defendants undertook to open in favour of K. & Co. a credit for £5000, "to be availed of by drafts on us . . . . against produce bought and paid for by you, but not immediately ready for shipment." Acting under the letter of credit, K. & Co. drew bills on the defendants without having bought and paid for produce, and negotiated them with the plaintiffs, a firm of bankers. The plaintiffs were aware of the terms of the letter of credit. The defendants declined to accept the bills. It was held that as no goods had been bought and paid for by K. & Co., the defendants were not liable (*Chartered Bank of India, etc.* v. *Macfadyen & Co.*, 1 Com. Cas., 1).

A banker does not vouch for the genuineness of the documents, but it is his duty to see that the documents purport on their face to be the documents described in the mandate (*Basse & Selve* v. *Bank of Australasia*, 1904, 20 T. L. R., 431). Thus, where a policy of insurance covering only a partial risk was sent instead of the usual all-risks policy, so that the acceptor of the bill could only recover on the documents part of his payment on the bill, the bank was held liable to recoup the

acceptor his loss (*Borthwick* v. *Bank of New Zealand*, 6 Com. Cas., 1).

Bankruptcy of Issuing Bank.—When a bank has issued documentary letters of credit, the bankruptcy of the bank is no reason why the contract between the bank and the bill holder should not be carried out, as it may be for the advantage of the bank to carry the contract through. In the case of banking companies in liquidation, the liquidator has in suitable cases received permission from the Court to accept and pay such bills. Thus, where the letter of credit authorised the drawing of bills on the deposit of bills of lading for the full amount of the bills of exchange, and before the bills were drawn the bank issuing the letter of credit failed, the grantee treated the failure as equivalent to a breach or repudiation of the contract; but it was held that that view was wrong, and that the grantee was not entitled to recover damages as upon a breach of the contract (In re *Agra Bank, Tondeur ex p.*, 1867, 5 Eq., 160).

Circular Notes, etc.—Circular letters of credit and circular notes are modified forms of letters of credit, issued in return for money paid, and made payable by the correspondents of the grantor in various foreign towns.[1] They are generally issued for the convenience of persons travelling abroad. In the case of a circular letter of credit, the letter states on its face the amount of the circular credit. It also bears on its face a list of the names of the bankers to whom it is addressed, and on the back of it there is a schedule, in which can be filled the dates and amounts of the payments made. Under such a letter of credit the customer will, on arriving at a particular town, call at the foreign banker's place of business, and will draw a cheque on the foreign banker

[1] For forms, see Appendix C, pp. 353-6.

on a form supplied by him. The letter contains a space for the grantee's signature, and the foreign banker can compare that signature with the one on his own cheque. The banker fills in the date and amount of his payment in the schedule on the back of the letter.

Where it is desired to have circular notes for use, notes for sums of £10 are issued to the customer, addressed to the bank's foreign correspondents. The customer takes with him as well a letter of indication, which contains the names of the foreign correspondents, and a request to them to cash the notes. The letter has a blank space for the customer's signature, and the notes contain on the back a blank form of draft, the signature to which can be compared with the signature in the letter of indication. Circular notes to some extent play the part of bank notes, as hotel-keepers and others will accept them.

If the circular notes are not all used, or the whole of the circular credit is not exhausted, the grantee can ask to have his money returned. If a note is lost or stolen, the bank need not refund except upon receiving an indemnity. As in the case of ordinary letters of credit, the rule holds good that a payment to a wrong person, *e.g.* through a forged signature, is not a good payment.

CHAPTER XIX

PERSONAL SECURITY—GUARANTEES

WHERE a bank determines to make advances to a customer on personal security, it may take such security either from the customer alone, or from the customer as principal and his friends as sureties.

An advance need not be the loan of a definite sum. An overdraft, varying from day to day, is an advance. But where an authority is given to borrow a definite sum, an overdraft is not a sufficient compliance with the terms of the authority (*Burton* v. *Gray*, 1873, 8 C. A., 932).

The security most usually given is a bond, a promissory note, or a guarantee. If a guarantee is taken, it should always be in writing, and signed by the person giving it, or his agent. It should be noted that when a creditor describes to a proposed surety the transaction intended to be guaranteed, he is held to represent that the transaction in question has no special features, other than any he may have expressly mentioned, making it different from other transactions of a similar character.

The subject may be considered in two parts,—first, the relation of the banker to his customer, and then the relation of the banker to the surety, if any,—but the former can be disposed of in a few lines.

The fact that the bank has taken personal security from

the customer does not prevent the bank suing the customer for the balance of the account, unless the security is in the form of a bond to which the customer is alone a party. (*Holmes* v. *Bell*, 1841, 3 Man. & G., 213.) In that case it appeared that a banker took from his customer and a surety for him a bond conditioned in a penal sum of £10,000 for the payment of all sums already advanced or thereafter to be advanced to the customer. It was held that the banker might sue the customer, upon the simple relation existing between them as creditor and debtor, for the actual balance of £4091.

Termination of Overdraft by Banker.—The question sometimes arises how long a banker who has agreed to give an overdraft is bound to continue making advances, and what notice is necessary before putting an end to the overdraft and suing for the money. Lord Herschell said, in a case decided on another point, "It is not necessary to consider what the rights of the bank were with regard to their debtors when they had agreed to an overdraft. The transaction is, of course, of the commonest. It may be that an overdraft does not prevent the bank who have agreed to give it from at any time giving notice that it is no longer to continue, and that they must be paid their money. This, I think, at least it does: if they have agreed to give an overdraft, they cannot refuse to honour cheques or drafts, within the limit of that overdraft, which have been drawn and put in circulation before any notice to the person to whom they have agreed to give the overdraft that the limit is to be overdrawn. . . . Even if it has no greater effect in point of law, it is obvious that neither party would have it in contemplation that when the bank had granted an overdraft it would immediately, without notice, proceed to sue for the money" (*Rouse* v. *Bradford Banking Coy.*, 1894, A. C., at p. 596).

Statute of Limitations.—Where the security taken is a promissory note payable on demand, if it is proved that the note was made as collateral security for the customer's banking account, it will remain in force (*i.e.* unbarred by the Statute of Limitations) for a period of six years, not from its date, but from the time when a balance was struck, and a demand made by the bank for payment. (*Hartland* v. *Jukes*, 1863, 1 H. & C., 667.) In that case it appeared that a note for £200, made by the customer and a surety, and dated December 5th, 1855, was given to secure the customer's account. The balance against the customer on December 31st, 1855, was £173, but no balance was then struck. A balance was struck on June 30th, 1856, and every subsequent half-year, until the account was closed, in February 1861, with an adverse balance of £172. An action was not brought on the note until March 28th, 1862, more than six years after the date of the note; and it was held that the bank could sue on the note, as six years had not elapsed since the first balance was struck. The decision in In re *J. Brown's Estate*, *Brown* v. *Brown* (1893, 2 Ch., 300), was to the same effect. See also *Parr's Banking Coy.* v. *Yates* (1898, 2 Q. B., 460), cited at p. 97.

A bond has this advantage over a promissory note, that the period for which it will remain in force is twenty instead of six years.

Continuing Security.—In the example just given at length, the note was expressly given as collateral security for the balance. When the promissory note is not payable on demand, but at a fixed date, *primâ facie* it is not intended to be a continuing security to meet the running balance from time to time due on an account, but to be given in consideration of an advance at the date of the note. If the payee asserts that the object of the

note was to secure such a balance, the burden of proof lies on the payee (In re *Boys*, *Eedes* v. *Boys*, 1870, 10 Eq., 467). The question whether the note is a continuing security or not is one of the greatest practical importance, as, if the note is not intended to be a continuing security, it will be discharged *pro tanto* by every subsequent payment into the customer's account, according to the rule in Clayton's case, and this although the adverse balance may not be materially diminished. For an example of this the reader is referred to the case of *Kinnaird* v. *Webster* (1878, 10 Ch. D., 138), cited at p. 124. Just as in the case of a promissory note, on proof that a bond was intended as a continuing security, the rule in Clayton's case will be excluded. Such a proof would be afforded if the bond was to secure the bank against advances which might *from time to time* be made to the customer; but it is not necessary to have an express stipulation, if it can be inferred from the language and conduct of the parties, after execution of the bond, that they intended the bond to stand as a continuing security (*Henniker* v. *Wigg*, 1843, 4 Q. B., 792).

Revocation by Surety.—When the security is a continuing guarantee, either under seal or in writing, it is important to know when and how the surety can put an end to his liability. If the security takes the form of a promissory note, the question does not arise.

A continuing guarantee, not under seal, is revocable if it has not yet been acted on, and so far as it has not been acted on (*Offord* v. *Davies*, 1862, 12 C. B. N. S., 748). In that case it appeared that a guarantee was given for the due payment of all bills of exchange discounted for a certain firm to the extent of £600 during twelve months. Before any bills were discounted, the guarantor countermanded the guarantee. The Court considered two

questions—namely, (*a*) whether the guarantee could be revoked before it was acted on; (*b*) whether, upon the guarantee being acted on for one bill, it could be revoked as to future bills,—and answered both in the affirmative. Each discount of a bill was held a separate transaction, creating a liability until the bill was met, and after that leaving the offer in the same position as if no discount had been made, that is to say, leaving it capable of revocation until again acted on.

The rule last given is based on the English doctrine of consideration, which does not apply to instruments under seal, such as a bond. Apparently, however, a bond given as a continuing security is revocable upon equitable principles, if the surety pays all that he owes under it at the time of his notice of revocation. Thus, it has been said that if a man gives a guarantee that he will be answerable for money to be advanced to A. B., up to a very large amount,—for example, £20,000,—and after the bank has advanced him £1000 only, the guarantor discovers that the person he has become security for is unworthy of credit, and of a totally different character from what was supposed when the guarantee was given, and that the money which the bank advanced to A. B. was utterly thrown away and wasted, he is entitled to give the bank notice of those facts, and to put an end to his liability by payment of the £1000 advanced. Such a rule does not seem to be a hardship upon the bank. (See *Burgess* v. *Eve*, 1872, 13 Eq., 450.)

Effect of Death.—In the absence of a special stipulation, notice of the death of the guarantor may be a revocation of the guarantee so far as regards advances made after such notice. (*Coulthart* v. *Clemenson*, 1879, 5 Q. B. D., 42.) In that case it appeared that two

guarantors jointly and severally guaranteed an overdrawn banking account, together with interest, commission, and other charges. It was stipulated that the guarantee was to be considered a continuing guarantee, and not to be withdrawn, but was to continue in full force until three months after notice to the manager of the bank of intention to discontinue or determine the same. About eight years afterwards one of the guarantors died, the account being then largely overdrawn. The bank received notice of the death, but continued the account for another three years. Sufficient sums of money, after notice of the death, were paid into the account, and generally appropriated to the current account, to cover any balance which was in fact owing at the time of such notice. When the account was closed, there was an adverse balance of about £3000. The bank sued the executor of the deceased guarantor. The Court held that the bank could not succeed. The provision as to the three months' notice related only to the guarantor's life, and as there was no corresponding provision as to the notice to be given on his death, the guarantee could be legally determined at any time after the guarantor's death, by proper notice to that effect. As to what constitutes a proper notice, it was said that it is not necessarily a special notice; and notice of the death of the testator, and of the existence of a will, is in general a constructive notice of the determination as to future advances of the guarantee. If the contracting parties desire that on the death of the guarantor a special notice shall be necessary to determine the guarantee, they can so provide in the guarantee itself.

Where the contract contained a provision that liability could be determined by one month's notice given by the obligors or their "representatives," it was held that

"representatives" included executors, and that a mere notice of death and of the existence of a will without a formal month's notice did not put an end to the liability. Romer J. differed from what was said in the case just cited as to the effect of notice of death and of the existence of a will (In re *Silvester*, 1895, 1 Ch., 573).

Discharge through act of Bank.—It often happens that just when a banker most wants to enforce his rights against the surety of a customer, the customer having gone as far as the banker can safely allow him, the banker loses his rights against the surety by making a new arrangement, which has in law the effect of discharging the surety, although such discharge is not contemplated either by the bank or the customer. A new agreement with the debtor, in variation of the original contract, is equivalent to a discharge of such original contract, and a substitution of the new contract in its place. It follows that if a third party has guaranteed as surety the due performance of the original contract, on the making of the new agreement he is discharged from liability, and there is nothing to affect him with any liability in respect of the substituted contract, unless, with full knowledge of all the circumstances, he consents to continue surety under it.

If, for instance, the creditor, by a new contract with the debtor, without the consent of the surety, enlarges the time of payment, the surety is discharged. The reason for this rule was thus expressed by Lord Eldon: "The surety is held to be discharged for this reason, because the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not, and because he, in fact, cannot have the same remedy against the principal as he would have had

under the original contract" (*Samuell* v. *Howarth*, 1817, 3 Mer., 278). In another case, where there was a question as to a guaranteed overdraft from a bank, it was said, "What I understand by a giving of time in such a case is this—the surety has a right at any moment to go to the creditor and say, 'I have reason to suspect the principal debtor to be insolvent, therefore I call upon you to sue him, or to permit me to sue him.' If the creditor has voluntarily placed himself in such a position as to be compelled to say he cannot sue him, he thereby discharges the surety" (*Strong* v. *Foster*, 1855, 17 C. B., at p. 219). Further, if the surety could be sued, as he in his turn would at once sue the principal debtor, the giving of time would have been rendered nugatory.

It is for this reason that the discharge by the creditor of the principal debtor is held to discharge the surety as well, because if the surety could be made to pay, he, in his turn, could at once make the debtor pay, and so the discharge would be of no effect.

To produce a discharge of the surety by a giving of time two things are necessary,—first, there must be a binding contract to give time, capable of being enforced (mere forbearance on the part of the creditor to sue the principal will not release the surety, see *Strong* v. *Foster*); secondly, the contract must be with the principal debtor, and not merely with a third person. (*Clarke* v. *Birley*, 1889, 41 Ch. D., 422.) In that case it appeared that the balance of the overdrawn account of a coal company with their bankers had been guaranteed by six sureties up to £25,000. Three of them afterwards, with a new surety, entered into a fresh agreement with the bank, whereby the guarantee was increased by another £8000. It was held that the new arrangement had not the effect of

releasing the three sureties who were not parties to it (compare *Rouse* v. *Bradford Banking Co.*, 1894, A. C., 586).

It sometimes happens that the creditor may have dealt with the surety as a principal; then, if the creditor afterwards receives notice of the true relation between the surety and the debtor, any subsequent variation of the debt or contract guaranteed, without the consent of the surety, will discharge the surety from liability (Leake, 802–804). Thus it appeared in a case that H. had brought to Overend's certain bills bearing the acceptances of the Financial Corporation. These bills had been accepted for the accommodation of H. and his principals. The Financial Corporation, though nominally the principal debtors, would therefore be only sureties (see p. 240). The bills were renewed on a guarantee by H. that the renewed bills should be met at maturity. The renewed bills were not paid, and Overend & Gurney gave, on April 6th, 1866, notice of dishonour to all the parties whose names were on the bills. On April 9th the solicitor of the Financial Corporation gave full information to Overend's that H. was the real principal on the bills, as the bills had been accepted merely for his accommodation. H. afterwards gave, as collateral security, to Overend's, bills to a much larger amount drawn on L. L., and Overend arranged with H. not to sue on the old bills if the bills on L. L. should be paid. Nothing further was done for some months. These last bills were not paid, and then Overend's brought an action against the Financial Corporation to recover the amount of the bills originally accepted by the Financial Corporation. It was held that the action could not be sustained (*Overend, Gurney & Co.* v. *Oriental Financial Corporation*, 1874, 7 E. & I., 348).

The same principle applies where two principal debtors agree between themselves that for the future one shall be a surety only, and this is made known to the creditor. If the creditor gives time to the principal debtor, he discharges the surety (*Rouse* v. *Bradford Banking Co.*, 1894, A. C., 586, at p. 592).

Surety giving Security on his own Property.—The question of taking security on property is dealt with hereafter in Chapter XXIV. But a debtor sometimes gets his surety not only to give a guarantee, but also to charge his property as additional security. An important difference then arises in the case of the bankruptcy of the principal debtor. If the creditor holds property of the principal debtor, he is a secured creditor, and must value his security, and prove for the balance only of the debt, unless he is prepared to surrender his security. If the creditor holds property of the surety he need not value this, but can prove in the bankruptcy of the principal debtor without making any deduction in respect of such security. The reason for this is, that, even if the creditor surrendered his security, the bankrupt's estate would not be increased, because the property would go to the surety, and not to the bankrupt's trustee.

CHAPTER XX

NEGOTIABILITY

A BANKER is constantly being offered by his customers an immense variety of instruments and documents as security for overdrafts. The object of this chapter is to discriminate generally between the various classes into which these documents may fall. To do this effectually, the reader must go back to some of the fundamental principles of English law. The first is that, except in the case of a sale in market overt, or in the exercise of certain powers of sale, no person can acquire a title to a personal chattel from a person who is not an owner; or, in other words, a person cannot give a better title than he himself has. The only exceptions to that rule arise by virtue of a statute, or by some custom of merchants prevailing in this country. The second principle is, that the benefit of a contract is not assignable. Thus, if A owed B £100, payable in three months' time, at common law B could not sell the debt to C without A's concurrence. In equity this could be done, but C must give notice to A, and if A had any claim against B, he could enforce it against C, or, in other words, C took subject to equities. The Judicature Act has introduced a statutory assignment of the benefits of a contract, but the assignment has to be in writing, notice

must be given to the debtor, and the assignee takes subject to equities. Negotiability is the name given to the exceptional qualities of a negotiable instrument, and a negotiable instrument may be defined as a written instrument, the benefit of which will, by the law merchant, pass by indorsement and delivery, or by mere delivery, so that a person taking the instrument *bonâ fide* and for value gets a good title (irrespective of previous defects of title), can sue on it in his own name, and takes it free from any equities which could be enforced against the original holder.

The law merchant has for a long time made the following English instruments negotiable, namely, bills of exchange, including Exchequer bills and cheques, and promissory notes, including bank notes, with most of which we have now dealt. Reference should be made to the paragraph on lost or stolen notes on p. 56, where the negotiability of bank notes is dealt with.

Up to the time of the decision of *Goodwin* v. *Robarts* (1876, A. C., 476, p. 230), English law drew a sharp distinction between foreign instruments purporting to be negotiable, and English instruments purporting to be negotiable.

Foreign Negotiable Instruments.—In the case of foreign instruments, such as Government bonds and scrip, debentures, and share certificates,[1] containing words making them transferable by delivery, either with or without indorsement, the English Courts decided to treat such instruments as negotiable, subject only to proof in each particular case that the instrument in question is by custom dealt with in England as a negotiable instrument.

The earliest example of a foreign instrument being

[1] For forms of some of these instruments, see Appendix C, pp. 346 9.

held to be negotiable was the case of the King of Prussia's bonds, in which he declared himself and his successors bound to every person who should for the time being be the holders of the bonds for the payment of the principal and interest in a certain manner. It was proved that such bonds were negotiated like Exchequer bills. The Court held the bonds to be instruments analogous to Exchequer bills and other English instruments negotiable by the law merchant (*Gorgier* v. *Mieville*, 1824, 3 B. & C., 45).

The further general question arises, namely, What is sufficient proof that a foreign instrument is by custom treated as negotiable? This is an important question, now that the London market is continually seeing the birth of new instruments, such as corporation bonds of obscure South American towns.

In a case in which the subject-matter of the action was the right of the true owner to recover bonds of the Bank of Buenos Ayres, which were securities to bearer, issued with a Government guarantee, and circulated on the European markets, Lord Justice Bowen made the following remarks: "A contractual document may be such that, by virtue of its delivery, all the rights of the transferor are transferred to, and can be enforced by, the transferee against the original contracting party, but it may yet fall short of being a completely negotiable instrument, because the transferee acquires by mere delivery no better title than his transferor. An admission was made at the trial to the effect that these bonds were commonly transferred from hand to hand by delivery, and this must be taken to be true. But the admission was carefully limited, and still left uncovered the question whether they are negotiable instruments in the sense in which bills of exchange and promissory notes are negoti-

able, so that delivery by a person who has no title confers, nevertheless, a title on a *bonâ fide* holder for value without notice. We shall require either a more unqualified admission, or else more conclusive evidence, before we could accept the view that bonds like these had become part of the currency of this country, so as to have acquired the peculiar characteristics of a completely negotiable instrument" (*Simmons* v. *The London Joint Stock Bank*, 1891, 1 Ch., 270, and 1892, A. C., 201). The test implied in these words, that a foreign instrument does not become negotiable unless custom puts it on a level with bills of exchange or bank notes, although well warranted by the early cases, is a stringent one.

The custom to treat a foreign instrument as negotiable must be an English custom, and the custom of the country of its issue is not sufficient (*Picker* v. *London & County Banking Company*, 1887, 18 Q. B. D., 515). In this case a question arose as to the rights of a true owner against the *bonâ fide* holder of a Prussian bond without coupons for interest. The evidence showed that these bonds were treated as negotiable instruments in Berlin, but there was no evidence of similar usage in England. It was held that the bond was not negotiable.

Other English Negotiable Instruments.—While the negotiability of foreign instruments payable to bearer or order was allowed by the English Courts on sufficient proof of mercantile usage, yet, until comparatively recently, English instruments (other than those already mentioned), such as bearer debentures, purporting to be negotiable, were not regarded as negotiable instruments. There is now no distinction between English and foreign instruments. The ground of the distinction between foreign and English instruments was apparently this.

A foreign instrument was not within the purview of the common law—it was not drawn in defiance of it—and if it purported to be negotiable, and was so treated in England by mercantile usage, then the Courts were satisfied, and would give effect to its negotiable character. But an English instrument purporting to be negotiable was looked upon as an attempt by individuals to override the common law rule which made choses in action unassignable; and the Court of Appeal decided in *Crouch* v. *Credit Foncier* (1873, 8 Q. B., 384) that usage could not add to the list of English negotiable instruments, nor take away from it, nor could the isolated action of an individual. However, when the case of *Goodwin* v. *Robarts* (1876, 1 A. C., 476; see p. 227) came before the Court of Appeal, the Court, although dealing with the case of Russian Government scrip actually before them, based their judgment on such wide grounds that there seemed no ground left on which to base the former decisions as to English instruments. The Court gave no countenance to the doctrine "that the law merchant is fixed and stereotyped, and incapable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce."

When, in 1898, the question of the negotiability of bearer debentures of an English company was brought before the Commercial Court, and ample evidence was given as to mercantile usage with respect to that class of instrument, the Court held that the debentures were negotiable instruments. No appeal was brought against that decision, and it must be regarded as good law (*Bechuanaland Exploration Coy.* v. *London Trading Bank*, 1898, 2 Q. B., 658). In a subsequent action the judge of the Commercial Court went even further in an action for the conversion of bearer debentures, some of

which were English instruments and some foreign. He not only held these instruments to be negotiable, but also said that in his opinion it was not now necessary to tender evidence to prove that bonds of the kind in question were negotiable instruments, that being a fact of which the Court will take judicial notice (*Edelstein* v. *Schuler & Co.*, 1902, 2 K. B., 144).

Common Form of Bearer Debentures.—A debenture is the technical name for an acknowledgment of indebtedness made by an incorporated company. A debenture often also contains a charge on the company's property.

The material clauses in these bearer debentures contain provisions to the following effect: (1) a promise to pay the principal when due to the bearer; (2) a notice that the principal moneys and interest will be paid without regard to any equities between the company and the original or any intermediate holder; (3) a provision that the issuing company shall not be bound to inquire into the bearer's title; and (4) an express intimation that until the bearer registers himself as holder, the debenture is to be regarded as negotiable, and all persons are invited by the issuing company and the owner for the time being to act accordingly.

Share Warrants and Scrip Certificates for Shares.—Share warrants to bearer issued under the Companies Act 1867, and scrip certificates for shares issued by English companies, have both been held to be instruments which may be negotiable by mercantile usage, and this must be regarded as good law at the present time, though some distinguished lawyers do not agree. Thus Bowen L.-J. said, in *Little* v. *London Joint Stock Banking Co.* (1891, 1 Ch., 270, at p. 296), that it was difficult to see how shares, share warrants, or certificates of shares in a company which are not securities for money can be

entitled to the description of negotiable instruments. In the most recent case on the subject (*Webb, Hale & Co.* v. *Alexandra Water Co.*, 93 L. T., 339), the Court of Appeal felt bound by the authority of *Rumball* v. *Metropolitan Bank* (1877, 2 Q. B. D., 194), which dealt with scrip certificates, to hold that share warrants to bearer issued by an English company under the provisions of the Companies Act 1867 were negotiable instruments; but Lord Alverstone said, "I should have thought that there was a great deal to be said for the view that there was a distinction in principle between a document which entitles a person to get his share in stock, and a document which entitles a person either to receive money or to get that which represents security for money."

Negotiability by Estoppel.—Now suppose that some new form of mercantile instrument comes into use which purports to be negotiable, but as to which no sufficient usage has yet grown up, or which is not a security for money or a share warrant. It is clear that the act of an individual person cannot make such an instrument negotiable. But a person (*a*) may issue an instrument drawn in such terms, or (*b*) may deal with an instrument so issued in such a way, that he thereby represents that, so far as he is concerned, his rights arising upon that particular document shall be regulated on the footing that the instrument has one or all the qualities of negotiability. A person who has made such a representation is precluded, or estopped, when that representation has been acted on by another, from afterwards turning round and setting up claims inconsistent with his former conduct. There is no estoppel where there is no inconsistency. Negotiability by estoppel is a phrase that is becoming popular, but it is a misleading one, as it apparently expresses that an instrument can become negotiable by

estoppel, whereas in fact only persons can be estopped, and the phrase merely expresses the fact that a particular person may be estopped from denying that a particular instrument is negotiable.

Estoppel of the Issuer.—The first requisite for negotiability by estoppel is that the instrument should contain words purporting to make it transferable by delivery, or by indorsement and delivery. The issuer of such a document will then be estopped from denying that a person who has become the holder of the instrument by delivery, or by indorsement and delivery, is entitled to sue on it, for that would be inconsistent with his representation.

If further words are inserted so that the instrument purports to be assignable free from equities, or if the mere presence of words making the document assignable by delivery, or by indorsement and delivery, is by a usage of trade equivalent to a representation that the instrument is assignable free from equities, the issuer of the instrument will be estopped from setting up, as against a person who has become the holder of the instrument, claims which he has against the person to whom he delivered it, for that would be inconsistent with his representation. This does not impair the general rule that an assignee takes subject to equities, for we have already seen (pp. 211–2) that the rule that a chose in action assignable only in equity must be assigned subject to the equities existing between the original parties to the contract must yield when it appears, from the nature or terms of the contract, that it must have been intended to be assignable free from and unaffected by such equities.

How usage imports a representation into a document was thus explained by Jessel, M.R. The Merchant Banking Company had taken iron warrants originally

issued by the Phœnix Bessemer Steel Company to Smith & Co., to cover acceptances on behalf of a customer. The warrants were to the effect that so much iron was held by Bessemer, "deliverable, free on board, to Smith & Co., or their assigns, by indorsement hereon." By the usage of the iron trade, such warrants are considered to pass to holders for value, free from any vendor's lien. The Merchant Company sought to enforce delivery of the iron without payment of the purchase money, which the original purchasers, Smith & Co., had never paid. It was held that the company could do so; and Jessel, M.R., said: "The form was invented about 1846, and the practice grew general about 1866, and, I think, from that time till now we must consider it, on the evidence, as an established custom, that any man who gives this warrant understands that it shall pass from hand to hand for value by indorsement, and that the indorsee is to have the goods free from any vendor's claim for purchase money. He is not to be asked whether he has a claim or not; if he chooses to issue it in this shape, he tells all the trade that they may safely deal on the faith of that warrant, and whether or not it becomes a negotiable instrument at common law, as distinct from equity, is, to my mind, utterly immaterial. That is the custom; and as the man who issues such a warrant knows that custom, it appears to me that the Phœnix Bessemer Company have issued these exactly as if they had said they were to be deliverable according to the custom of the iron trade, that is, to be deliverable, 'free from any vendor's lien,' to Messrs Smith & Co., or their assigns, by indorsement. If those words had been inserted, as I think it will be desirable in future they should be inserted, can anybody doubt that the company, by issuing the warrant in that form, would be precluded in equity from afterwards

alleging that they were unpaid vendors?" (*Merchant Banking Company* v. *Phœnix Bessemer Steel Company*, 1877, 5 Ch. Div., 205).

In the case of *Goodwin* v. *Robarts* (1876, 1 A. C., 476), the subject-matter of the action was some scrip, which stated on its face that on payment of certain instalments "the bearer" would be entitled to receive a bond from the Russian Government. Such scrip was by the custom of the Stock Exchange treated as negotiable, and the instrument was therefore itself negotiable, but Earl Cairns rested his decision upon the further ground of estoppel, and said: "The scrip itself would be a representation to anyone taking it . . . that if the scrip were taken in good faith, and for value, the person taking it would stand to all intents and purposes in the place of the previous holder; . . . the plaintiff is in the position of a person who has made a representation on the face of his scrip that it would pass with a good title to anyone on his taking it in good faith and for value." The term "bearer" is now so well known, and so constantly used to express the fact that the issuer is willing to have the instrument treated as negotiable so far as his rights are concerned, that the use of that word, apart from any trade custom or usage, is most probably sufficient to constitute a representation to that effect. Whether an instrument purporting to be payable to order would, apart from a trade usage as to the nature of the contract, be held to contain a similar representation, is a more difficult matter to decide, and one on which there is no satisfactory authority.

Estoppel of past Holder.—It does not by any means follow that, because the issuer of an instrument would be estopped from denying that it might be treated as negotiable, subsequent holders would be so estopped. Such

holder will only be estopped when he has so dealt with the instrument as to have become a party to the representations it contains. The kind of question which arises is this: A is the owner of an instrument transferable by delivery, and B becomes possessed of it in fraud of A, but manages to pass it on to his bankers, who take it *bonâ fide* and for value. Under what circumstances is A precluded from asserting his title to the instrument against the bank? A will be so precluded or estopped when the instrument contains a sufficient representation that a person taking it *bonâ fide* and for value will get a good title (see preceding section), and A has so dealt with it that he has become a party to such representation, or, in other words, when for A to assert his title to the instrument would be to do something inconsistent with his previous dealings with the instrument. Unluckily, what dealing is sufficient for this purpose is a question which is most uncertain.

In the case before referred to of *Bechuanaland Expln. Co.* v. *London Trading Bank* (1898, 2 Q. B., 658), the facts were that the debentures were issued by the Beira Co. The Bechuanaland Co. were the owners of the debentures and kept them in the office safe. The secretary, who had the key of the safe, stole them and pledged them with the London Trading Bank, and put the money in his own pocket. Here the Beira Co., as issuers, might have been estopped from disputing the title of the bank, on the ground that they had held themselves out as willing to pay "bearer," but the Bechuanaland Co. could not be estopped merely from the fact of having bought the debentures, put them in the safe, and entrusted the key to a proper officer. There was nothing to prevent the Bechuanaland Co., the original true owners, from

claiming back the debentures — except their possible negotiability.

In the case of *Goodwin* v. *Robarts*, already referred to, the scrip was left by the plaintiff in his broker's hands, and the broker deposited it with his bankers to secure an overdraft. Earl Cairns decided that such dealing made the plaintiff a party to the representation on the face of the scrip, and estopped him from setting up his title as against the bankers. Lord Bramwell, in the case of *The Colonial Bank* v. *Cady* (1890, 15 A. C., 282), said that he saw no ground for applying the doctrine of estoppel in *Goodwin* v. *Robarts*, as the plaintiff there was not making a claim inconsistent with anything he had theretofore said or done.

CHAPTER XXI

BILLS OF EXCHANGE

History.—A bill of exchange was originally a means by which a trader in one country paid a debt in another country without the transmission of coin. If A in London owed money to C in Paris, but himself was owed an equal sum of money by B in Paris, A would order B to pay C, the debts would be cancelled, and the same effect would have been produced as if A had sent money to C, and B had sent money to A. A's written order to B, sent to C, and acceded to by B, was the first form of a bill of exchange. A was the drawer, B the drawee, who, upon consenting to the arrangement, becomes the acceptor, and C the payee. It was at one time of the essence of a bill that the drawer and acceptor should be traders in different countries; later, it was sufficient if they lived in different towns; now, by English law, it does not matter where the parties live, nor need bills be trade documents.[1]

Relationship of Parties to the Bill.—But the utility of a bill of exchange would be small if it never passed out of the hands of the immediate parties to it. B, the drawee or acceptor, is generally given a fixed time in

[1] For forms, see Appendix C, pp. 334-6.

which to pay, *e.g.* so many days after sight, or three months from the date of drawing, and C, the payee, might want cash at once. In fact, in a typical case of a bill of exchange, such for example as a bill drawn by a manufacturer on the wholesale dealer in favour of himself for the price of goods supplied, the manufacturer may want to recoup his outlay at the earliest possible moment. In order to do this, he must sell the bill under discount; and to give the purchaser (generally a bank or a bill-broker) the right to receive the money from the acceptor at the due date, he has to write his name on the back of it. This is called indorsing it, and the person so signing is an indorser. If he wants to make the bill payable to a particular person, he also puts that person's name on the bill, and such person becomes an indorsee. If he puts no name other than his own as indorser, the bill becomes payable to bearer until it is again made payable to order. When a bill of exchange has gone the round of several holders, there may be quite a number of persons liable on it, but the law merchant, and now the Bills of Exchange Act 1882, has settled the order of their liability. In the case of an ordinary trade bill, "prior to acceptance the drawer is the principal debtor, and indorsers are sureties for him. On acceptance, the drawee takes on himself the principal liability, and the drawer and indorsers are sureties for the acceptor, but they are not in a position in which ordinary sureties are, where several are sureties for one person; that is to say, while they are all co-sureties towards the holder, who may proceed against any or all on default of the principal debtor, they are not co-sureties towards each other, and entitled, as such, to contribution from each other all round. As regards each other, the most rigid punctilio and order of sequence prevails. As between themselves,

each prior party is a principal, and those who come after him are sureties" (Loyd, p. 38). In the case of an accommodation bill, the relationship of the parties, as either principal or surety, affords a good definition of such a bill. "If, as between the original parties to the bill, that one who would *primâ facie* be principal is in fact the surety, whether he be drawer, acceptor, or indorser, that bill is an accommodation bill" (Loyd, p. 27). If this relationship is borne in mind, many of the provisions of the Bills of Exchange Act 1882, which at first may seem arbitrary, are explained. For example, by sec. 45 failure to present for payment discharges the drawer and indorsers who are sureties, but not the acceptor, who is the principal debtor.

The following is a summary of the principal sections of the Bills of Exchange Act 1882, and of some of the cases bearing on it.

Definition—(sec. 3).—A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money, to or to the order of a specified person, or to bearer. The instrument must not order anything but the payment of money, and the order must not be to pay out of a particular fund, though the order, if in unqualified terms, may indicate the fund out of which the drawee is to reimburse himself, or the account to be debited with the payment.

A cheque with a form of receipt on the back is a bill of exchange so long as the order to the bank to pay is unconditional, and therefore such a cheque is a negotiable instrument (*Nathan* v. *Ogdens Ltd.*, 93 L. T., 553). It is otherwise if the order to pay is conditional on the receipt

being filled up (*Bavins* v. *L. & S. Western Bank*, 1900, 1 Q. B., 270).

Inland Bills—(sec. 4).—If the bill is, or on the face of it purports to be, drawn and payable within the British Islands, or drawn within the British Islands upon some person resident therein, it is an inland bill; otherwise, it is a foreign bill. Unless the contrary appear on the face of the bill, the holder may treat it as an inland bill.

Dual Capacity and Fictitious Persons—(secs. 5, 6, and 7).—The drawer and payee may be the same person, or the drawee and payee may be the same person. Where the drawer and drawee are the same person (as in a bank post bill), or the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument either as a bill or as a promissory note. The drawee must be named with reasonable certainty, and so must the payee, unless the bill is payable to bearer. The bill must not be addressed to two or more drawees alternatively or in succession. Several payees may be named, either jointly or in the alternative. A bill may also be made payable to the holder of an office for the time being. Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer.

For the cases as to fictitious or non-existing persons, see pp. 174, 182.

Negotiable Bills—(sec. 8).—A bill is not negotiable if it contains words indicating an intention that it should not be transferable. A negotiable bill may be payable to bearer or to order. It is payable to bearer if expressed to be so, or if the last indorsement is in blank; otherwise, a bill is payable to order.

An intention to prohibit transfer must be clearly

expressed (*National Bank* v. *Silk*, 1891, 1 Q. B., 435). See the reference to that case on p. 198.

Sum Payable—(sec. 9).—The sum payable is a sum certain, although it is required to be paid (*a*) with interest, (*b*) by stated instalments, (*c*) with a provision that upon default in payment of any instalment the whole shall become due, (*d*) according to a particular rate of exchange.

Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated, from the issue thereof.

Issue means the first delivery of a bill or note, complete in form, to a person who takes it as a holder. Thus where a blank acceptance was returned to the giver of it, and put by him in a drawer, from which it was afterwards stolen, and was then filled up, it was held that the bill had never been issued, and that the acceptor was not liable (*Baxendale* v. *Bennett*, 1878, 3 Q. B. D., 525).

If the sum payable is expressed in both words and figures, and there is a discrepancy, the sum denoted by the words is the amount payable.

It is usual to return such bills or cheques, but in some cases the banker offers to pay the smaller amount.

Time of Payment—(secs. 10, 11, and 14).—A bill is payable on demand which is expressed to be payable on demand, or at sight, or on presentation, or in which no time for payment is expressed. A bill, accepted or indorsed when overdue, is, as regards such acceptor or indorser, payable on demand. A bill is payable at a determinable future time which is payable (1) at a fixed period after date or sight, (2) on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be

uncertain. An instrument expressed to be payable on a contingency is not a bill. For bills not payable on demand, three days of grace are allowed. If the last day of grace is a Sunday, Christmas Day, or Good Friday, the bill must be paid on the preceding business day; if a bank holiday, then on the succeeding business day.

Case of Need, etc.—(secs. 15 and 16).—The drawer of a bill and any indorser may insert therein (*a*) the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonoured by non-acceptance or non-payment; (*b*) an express stipulation (1) negativing or limiting his own liability to the holder, (2) waiving, as regards himself, some or all of the holder's duties.

The object of these provisions is to save time and expense when a bill is dishonoured.

Acceptance—(secs. 17, 18, and 19).—An acceptance is the signification by the drawee of his assent to the order of the drawer. It must be written on the bill and be signed by the drawee. The mere signature of the drawee is sufficient. The acceptance must not express that the drawee will perform his promise by any other means than the payment of money.

A bill may be accepted while incomplete, or when overdue, or after dishonour.

An acceptance may be general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn. An acceptance to pay at a particular place is not a qualified acceptance unless it expressly states that the bill is to be paid there only, and not elsewhere.[1]

[1] For forms of acceptances, see Appendix C, p. 337.

If the acceptor of a bill of exchange desires to qualify his acceptance, he must do so on the face of the bill in clear and unequivocal terms, and so that any person taking the bill could not, if he acted reasonably, fail to understand that it was accepted subject to an express qualification (*Meyer* v. *Decroix*, 1891, A. C., 520).

Inchoate Bill—(sec. 20).—A simple signature on a blank stamped paper delivered by the signer in order that it may be converted into a bill operates as a *primâ facie* authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser. If a bill is wanting in any material particular, the person in possession of it has a *primâ facie* authority to fill up the omission in any way he thinks fit. A person who becomes a party prior to completion may refuse performance of his contract if the bill is not filled up within a reasonable time, or not strictly in accordance with the authority given, provided that the person suing on the bill is not a holder in due course, to whom the bill has been negotiated after completion.

In the case of *Herdman* v. *Wheeler* (1902, 1 K. B., 361) it was considered a matter of doubt whether the payee of a promissory note could, under any circumstances, be a holder of it in due course; but in the case of *Lloyds Bank* v. *Cooke* (1907, 1 K. B., 794), L. J. Moulton expressed a strong opinion that this section of the Bills of Exchange Act was not intended to impair the position of a payee as contrasted with an indorsee. "I am satisfied that the term 'holder in due course' which is used in the Act, is intended to be the equivalent of the term '*bonâ fide* holder for value' which was used prior to the Act." The actual decision in *Lloyds Bank* v. *Cooke* was that this section does not exclude the common law

estoppel which arises when a person signs a promissory note in blank, and gives it to an agent to fill up. The authorised amount was £250, and the amount filled in was £1000. It was held that the bank to whom the note had been made payable as security for an advance, could recover the larger amount. The following passage from *Baxendale* v. *Bennett* (1878, 3 Q. B. D., 525, at p. 531) was quoted with approval by Collins (M. R.): "The law as to the liability of a person who accepts a bill in blank is that he gives an apparent authority to the person to whom he issues it, to fill it up to the amount that the stamp will cover; he does not actually authorise him, but enables him to fill it up to a greater amount than was intended. Where a man has signed a blank acceptance, and has issued it, and has authorised the holder to fill it up, he is liable on the bill whatever the amount may be, though he has given secret instructions to the holder as to the amount for which he shall fill it up; he has enabled his agent to deceive an innocent party, and he is liable."

Delivery—(sec. 21).—Delivery means transfer of possession, actual or constructive, from one person to another. Every contract on a bill is incomplete and revocable until delivery of the instrument in order to give effect thereto, except that when an acceptance has been written on a bill, and notice has been given to or according to the directions of the person entitled to the bill, it is irrevocable. If the bill be in the hands of a holder in due course, a valid delivery of the bill by all parties prior to him, so as to make them liable to him, is conclusively presumed. If the bill is no longer in the possession of a party who has signed it as drawer, acceptor, or indorser, a valid and unconditional delivery by each such party is presumed until the contrary is proved.

Capacity to Contract—(sec. 22).—Any person who can contract may become liable on a bill, but a corporation can only become liable under the general law as to corporations, *i.e.* if it is a trading corporation, for whose business bills are necessary, or if it has express powers to draw, accept, or indorse bills (see pp. 130–1).

The fact that the drawer or an indorser of a bill cannot be sued because of his incapacity to contract in that form is no defence to the other parties when sued by the holder.

Signature—(secs. 23 to 26).—There is no liability on a bill except upon signature, but a person who signs in a trade or assumed name is liable just as if he had signed in his own name, and the signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm. A forged or unauthorised signature is wholly inoperative except by estoppel (see p. 162). An unauthorised signature can be afterwards ratified, but a forged signature cannot be ratified. A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority. A signature indicating that the person signing signs for or on behalf of a principal, or in a representative character, does not make him personally liable; but for a signer to escape liability, it is not enough that there should be an addition of words describing him as an agent, or as filling a representative character.

Consideration—(secs. 27, 28).—Consideration may be (*a*) any consideration sufficient to support a simple contract, or (*b*) an antecedent debt or liability. If value has at any time been given for a bill, the holder

is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time. When the holder of a bill has a lien on it, he is a holder for value to the extent of his lien.

An accommodation party to a bill is a person who has in any way signed it without receiving value therefor, and for the purpose of lending his name to some other person. Such a party is liable to a holder for value, even if the holder took the bill knowing that the party was an accommodation party.

Holder in Due Course—(sec. 29).—A holder in due course is one who has taken a bill complete and regular on the face of it before it was overdue, or without notice of its previous dishonour, and in good faith and for value, and without notice of defect in the title of the person who negotiated it. The title of a person is defective when he obtained the bill, or its acceptance, by fraud, duress, or force or fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud. An innocent holder, whether for value or not (*e.g.* a banker who holds for collection), who derives his title to a bill through a holder in due course, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.

Presumptions of Value and Good Faith—(sec. 30).—Every party whose signature appears on a bill is *primâ facie* deemed to have become a party for value. Every holder of a bill is *primâ facie* deemed to be a holder in due course; but if, in an action in a bill, it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud or illegality, the burden of proof is shifted unless and until the holder

proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill.

This section has been held to mean that, when fraud is proved in the previous history of the bill, the burden of proof is on the holder to prove both that value has been given and that it has been given in good faith and without notice of the fraud (*Tatam* v. *Hasler*, 1889, 23 Q. B. D., 345).

Transference of Bills—(sec. 31).—A person becomes the holder of a bill payable to bearer, by delivery of the bill; of a bill payable to order, by indorsement of the holder, followed by delivery. A transferee of a bill payable to order who takes for value, but without indorsement, gets such title as the transferor had, but no better title. He has the right to demand the indorsement of the transferor. Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability.

Indorsement—(secs. 32 to 35).—An indorsement, to be effective, must be written on the bill, but need not be more than a simple signature. It must be an indorsement of the entire bill. Where a bill is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others. If, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is misspelt, he may indorse the bill as therein described, adding, if he think fit, his proper signature. Indorsements on a bill are taken to have been made in the order in which they appear on the bill, until the contrary is proved. An indorsement may be in blank, and then the bill becomes payable to bearer; or special, when a person is specified to whom or to whose order the bill is to be payable, and then

the indorsee is practically in the position of a payee The payer of a bill may pay an indorsee without regard to any conditions which may have been attached to the indorsement.

When a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorse ment by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person.

The indorsement may contain restrictive terms. A restrictive indorsement is such as—"Pay D only," or "Pay D for the account of X," or "Pay D, or order, for collection." Such an indorsement gives the indorsee the rights of the indorser so far as receiving payment of the bill and suing any party thereto, but gives him no power to transfer his rights as indorsee without express authority; and where such authority exists, subsequent indorsees take the bill with the same rights, and subject to the same liabilities, as the first indorsee under the restrictive indorsement.

Overdue and Dishonoured Bills—(sec. 36).—A bill continues to be negotiable until restrictively indorsed or discharged by payment or otherwise. An overdue bill can only be negotiated subject to any defect of title affecting it at its maturity. A bill payable on demand (*e.g.* a cheque) is overdue when it appears from the face of the bill that it has been in circulation an unreasonable time (see p. 167). An indorsement not dated after maturity is *primâ facie* deemed to have been made before maturity. A dishonoured bill not overdue is in the hands of a person taking with notice of the dishonour, subject to any defect of title attaching to it at the time of dishonour.

Rights of Holder—(sec. 38).—The holder of a bill may

sue on the bill in his own name. Even when his title is defective, (*a*) he can give to a holder in due course a better title than he has himself got, and (*b*) payment to him in due course discharges the payer. If he is himself a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill.

Presentment for Acceptance—(secs. 39 and 40).—A bill payable after sight must be presented for acceptance in order to fix its maturity. A bill may expressly stipulate for presentment for acceptance; if that is so, or if the bill is drawn payable elsewhere than at the residence or place of business of the drawee, it must be presented for acceptance before presentation for payment; otherwise, the bill need not be presented for acceptance to render liable any party to the bill.

"It is in all cases advisable for the holder of an unaccepted bill to present it for acceptance without delay; for, in case of acceptance, the holder obtains the additional security of the acceptor, and if acceptance be refused, the antecedent parties become liable immediately. It is advisable, too, on account of the drawer, for, by receiving early advice of dishonour, he may be better able to get his effects out of the drawee's hands" (Byles on Bills, 16th ed., p. 211).

When a bill payable after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time; and if he do not do so, the drawer and all indorsers prior to that holder are discharged.

"Reasonable time" will depend on the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case.

A bill drawn by bankers on their correspondents, payable after sight, does not require immediate presentment (*Shute* v. *Robins*, 1828, 3 C. & P., 80).

Mode of Presentment—(sec. 41 (1)).—The presentment must be by the holder or his agent to the drawee or his agent at a reasonable hour on a business day, and before the bill is overdue; if there are two or more drawees, not partners, presentment must be made to them all, unless one has authority to accept for all; if the drawee is dead, presentment may be made to his personal representatives; if bankrupt, to him or his trustee: where authorised by agreement or usage, a presentment through the Post-Office is sufficient.

It is a custom of London bankers, when a foreign cheque is paid to a banker by a customer, if the banker has no agent at the place where the cheque is payable, to send the cheque direct by post to the banker on whom it is drawn, demanding payment (*Heywood* v. *Pickering*, 1874, 9 Q. B., 428).

Presentment excused—(sec. 41 (2)).—Presentment is excused, and a bill may be treated as dishonoured by non-acceptance, if the drawee is dead or bankrupt, or is a fictitious person, or one incapable of contracting, or if, after the exercise of reasonable diligence, it cannot be effected; but not merely because the holder has reason to believe that the bill will be dishonoured.

Non-acceptance — (secs. 42 and 43). — A bill duly presented and not accepted within the customary time must be treated as dishonoured by non-acceptance, or else the holder will lose his right of recourse against the drawer and indorsers. Such right of recourse immediately accrues, and no presentment for payment is necessary.

The customary time for acceptance is twenty-four

hours, exclusive of non-business days. After the bill has been left for acceptance, a further call should be made to obtain the return of the bill, unless there is some usage to the contrary.

Taking of Qualified Acceptance—(sec. 44).—The holder need not accept a qualified acceptance; and if that is all that he can get from the drawee, he may treat the bill as dishonoured by non-acceptance.

Where the holder takes a qualified acceptance without authority from the drawer or an indorser, such drawer or indorser is discharged from liability, unless there is a subsequent assent to the qualified acceptance. Such assent is deemed to have been given if the drawer or indorser has received notice, and does not, within a reasonable time, express his dissent to the holder.

Presentment for Payment—(secs. 45 and 46).—(a) *When necessary.*—As a general rule, a bill must be presented for payment, otherwise the drawer and indorsers will be discharged. A bill presented at the proper place, where, after the exercise of reasonable diligence, no one authorised to pay or refuse payment can be found, need not be further presented; and presentment is dispensed with where, after the exercise of reasonable diligence, it cannot be effected, or where the drawee is a fictitious person, or where presentment has been waived; and, under certain circumstances, in the case of an accommodation bill, as to the accommodated parties.

The fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment.

(b) *Time.*—Presentment of a bill not payable on demand must be made on the day it falls due, and of a bill payable on demand within a reasonable time after

issue, in order to make the drawer liable, or within a reasonable time after indorsement in order to make an indorser liable.

(c) *Mode* —The bill must be presented by the holder or his authorised agent at the proper place to the payer, or his authorised agent, at a reasonable hour on a business day.

(d) *Proper Place.*—The proper place is, first, the place of payment (if any) specified in the bill; secondly, the address of the acceptor (if any) appearing on the bill; thirdly, the acceptor's place of business, if known; fourthly, the acceptor's ordinary residence, if known; and, as a last resource, wherever the acceptor can be found, or his last known place of business or residence.

(e) *Two or more Acceptors.*—If these are not partners, and no place of payment is specified, presentment must be made to them all.

(f) *Death of Acceptor.*—If the acceptor is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found.

(g) *By Post.*—If authorised by agreement or usage, a presentment through the Post-Office is sufficient.

(h) *Excusable Delay.*—Delay in making presentment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

Dishonour by Non-Payment. This occurs when a bill is duly presented and payment is refused or cannot be obtained, or when presentment is excused, and the bill is overdue and unpaid. Upon such dishonour a right

of recourse against the drawers and indorsers accrues to the holder.

Notice of Dishonour—(secs. 48, 50 (2)).—(a) *When necessary.*—When a bill has been dishonoured either by non-acceptance or non-payment, as a general rule notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged. But if a bill is dishonoured by non-acceptance, the rights of a holder in due course, who has taken the bill after an omission to give notice, are not prejudiced by such omission. Due notice of dishonour for non-acceptance excuses notice for non-payment, unless in the meantime the bill has been accepted.

Notice is dispensed with when, after the exercise of reasonable diligence, it cannot be given to, or does not reach, the drawee or indorser sought to be charged; or if it has been waived; or where the drawee is a ficititious person, or a person not having capacity to contract, and the person to whom notice would have been due was aware of the fact when he became a party to the bill; or under certain circumstances as to the accommodated parties in the case of an accommodation bill; or if the drawer or indorser is the person to whom the bill was presented for payment.

(b) *Successive Notices*—(sec. 49 (13), (14)).—Where a bill, when dishonoured, is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he gives notice to his principal, he must do so within the same time as if he were the holder, and the principal, upon receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder.

Where a party to a bill receives due notice of dishonour, he has, after the receipt of such notice, the same period of time for giving notice to antecedent parties that the holder has after dishonour.

(c) *By Whom*—(sec. 49 (1)).—The notice must be given by or on behalf of the holder, or by or on behalf of an indorser, who at the time of giving it is himself liable on the bill.

(d) *Effect*—(sec. 49 (3), (4)).—Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given; where given by or on behalf of an indorser, it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given.

(e) *Mode and Form*—(sec. 49 (5) to (10)).—The notice may be, but need not be, in writing. It must identify the bill, and intimate that it has been dishonoured by non-acceptance or non-payment. The Act is silent as to the form of a notice of dishonour. "It is not required to be in any particular form . . . . it may be by writing or by personal communication, and may be in any terms, provided it gives the necessary information. It was plainly intended to give the widest discretion as to the form of notice"[1] (*Fielding* v. *Corry*, 1898, 1 Q. B., 268, at p. 271). Notice by telegram has been said to be sufficient, and there seems no reason why notice by telephone should not be good. The return of a dishonoured bill is a sufficiently formal notice. A misdescription of the bill does not make the notice bad, unless it misleads the person to whom the notice is given. The notice may be given to the person entitled to notice, or to his special agent. If the drawer or

[1] For forms of notices of dishonour, see Appendix C, p. 338.

indorser is dead, and the person giving notice knows that fact, the notice must be given to a personal representative, if such there be, and if, with the exercise of reasonable diligence, he can be found; if the drawer or indorser is bankrupt, notice may be given to such party himself or to his trustee.

(f) *Time*—(sec. 49 (12), (15)).—Notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time. When payment of a bill is refused by the acceptor at any time on the last day of grace, the holder, though he is entitled at once to give notice of dishonour to the drawer and indorsers, has no cause of action against either the acceptor or the other parties to the bill until the expiration of that day (*Kennedy* v. *Thomson*, 1894, 2 Q. B., 759). In general, a notice, if the persons to give and receive it reside in the same place, must be sent off in time to be received on the day after the dishonour of the bill, otherwise it must be sent off not later than the day after the dishonour of the bill if there is a post at a convenient hour on that day; and if there is no such post, then not later than by the next post thereafter. Where a notice is duly addressed and posted, the sender is deemed to have given due notice, notwithstanding any miscarriage by the Post-Office.

(g) *Delay*—(sec. 50 (1)).—Delay in giving notice of dishonour is excused when the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the notice must be given with reasonable diligence.

Protest—(sec. 51).—In the case of the dishonour of a foreign bill, appearing on the face of it to be such, it must be protested, otherwise the drawer and indorsers

will be discharged. The chief features of protesting are—

(a) *Mode.*—A protest must contain a copy of the bill, and must be signed by the notary making it, and must specify (1) the person at whose request the bill is protested, and (2) the place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found.[1]

(b) *Time.*—When a bill is noted or protested, it must, in general, be noted on the day of its dishonour. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting. Where the acceptor of a bill becomes bankrupt or insolvent, or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.[2]

(c) *Place.*—A bill must be protested at the place where it is dishonoured, except that (*a*) if presented and returned through the post dishonoured, it may be protested at the place of return, and on the day of its return if received during business hours; and if not so received, then not later than the next business day; and (*b*) if drawn payable at the place of business or residence of some person other than the drawee (*e.g.* his banker's) and dishonoured by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

(d) *Lost Bill.*—Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars of it.

[1] For forms of protest, see Appendix C, pp. 339–341.

[2] For form of such protest, see Appendix C, pp. 340–1.

Noting.—Noting is the term used to describe the official noting by the notary public or his agent of the facts as to dishonour. It has been termed an "incipient protest." In the case of an inland bill, noting and protest are preliminaries to acceptance or payment for honour.

Position of Acceptor—(sec. 52).—The acceptor is liable on a bill accepted generally without presentment for payment, and also on a bill with a qualified acceptance, unless it is expressly stipulated that he is to be discharged by the omission to present the bill on the day that it matures. He is not entitled to have the bill protested or to notice of dishonour. The payer may demand to see the bill before payment, and to have it delivered up upon payment.

Funds in Drawee's Hands—(sec. 53).—A bill does not operate as an assignment of funds in the hands of the drawee available for its payment; and if the drawee does not duly accept, he is not liable on the bill. In Scotland the bill does operate as such an assignment from the time when the bill is presented to the drawee.

Effect of Acceptance—(sec. 54).—The acceptor by accepting a bill engages that he will pay it according to the tenor of his acceptance, and is precluded from denying to a holder in due course (*a*) the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill; (*b*) if the bill is drawn payable to drawer's order, the then capacity of the drawer to indorse, and if payable to a third person's order, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of the drawer's or payee's indorsement.

Effect of Drawing—(sec. 55 (1)).—The drawer of a bill by drawing it (*a*) engages that on due presentment it

shall be accepted and paid according to its tenor, that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it provided that the requisite proceedings on dishonour be duly taken, and (*b*) is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

Effect of Indorsing—(sec. 55 (2)).—The indorser of a bill by indorsing it makes a similar engagement as to the holder or a subsequent indorser, and is precluded from denying (*a*) to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements, and (*b*) to subsequent indorsees that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title to it.

Stranger—(sec. 56).—Where a person signs a bill otherwise than as drawer or acceptor, he incurs the liabilities of an indorser to a holder in due course. But the bill must be complete and regular on the face of it at the time of indorsement (*Jenkins* v. *Comber*, 1898, 2 Q. B., 168).

Measure of Damages—(sec. 57).—If a bill is dishonoured, the holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay may recover from the acceptor, the drawer, or a prior indorser, (1) the amount of the bill, (2) interest from the time of presentment if the bill is payable on demand, otherwise interest from maturity, (3) the expenses of noting or protest when necessary. In the case of a bill dishonoured abroad, the damages may be the amount of the re-exchange, with interest till the time of payment.

A bill was drawn in Rio and accepted in London. Before its maturity the acceptors became bankrupt. It was protested for better security, and was accepted supra protest by the drawers' London bankers. It was also protested for non-payment. The London bankers paid the principal and all these expenses, and charged the drawers a commission. It was held that the drawers could not prove in the acceptors' bankruptcy for the expenses of protest for better security, nor for the commission, as not being necessary expenses (In re *English Bank of the River Plate*, 1893, 2 Ch., 438).

Transfer by Delivery—(sec. 58).—The holder of a bill payable to bearer may negotiate it by delivery without indorsement; he does not become liable on the instrument, but he warrants to his immediate transferee for value that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless.

Discharge of Bill—(secs. 59, 61).—(a) *Payment.*—Payment in due course is payment made at or after the maturity of the bill to the holder of it in good faith, and without notice that his title to it is defective. Such payment discharges the bill when made by or on behalf of the drawee or acceptor, and in the case of an accommodation bill, when made by the party accommodated.

In the case of a bill payable to or to the order of a third person, payment by the drawer gives him the power to enforce payment of it against the acceptor, but not power to re-issue the bill.

Where a bill is paid by an indorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks

fit, strike out his own and subsequent indorsements, and again negotiate the bill.

A bill is also discharged by the acceptor becoming the holder of it in his own right at or after its maturity.

The expression "in his own right" is not used in contradistinction to a right in a representative capacity, but indicates a right not subject to that of another person, and good against all the world (*Nash* v. *De Freville*, 1900, 2 Q. B., 72).

(b) *Waiver*—(sec. 62 (1)).—A bill is discharged by the holder, at or after its maturity, absolutely renouncing his rights against the acceptor. The renunciation must be in writing, unless the bill is delivered up to the acceptor.

(c) *Cancellation*—(sec. 63).—A bill is discharged by the intentional cancellation of the bill by the holder or his agent if the cancellation is apparent. If such cancellation is of the signature of a party liable on the bill, such party is discharged, and so is any indorser who would have had a right of recourse against him. An unintentional, mistaken, or unauthorised cancellation is inoperative.

(d) *Alteration*—(sec. 64).—Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised, or assented to the alteration, and subsequent indorsers, provided that when such alteration is not apparent a holder in due course may enforce payment of the bill according to its original tenor. Among material alterations are—any alteration of the date, sum payable, time of payment, place of payment, and where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent.

The acceptor of a bill is not under a duty to take precautions against fraudulent alterations in the bill after acceptance (*Scholfield* v. *Earl of Londesborough*, 1896, A. C., 514; see also p. 180).

Acceptance for Honour — (secs. 65, 66, and 67). — Where a bill has been protested for dishonour by non-acceptance, or protested for better security, and is not overdue, any person, not being a person already liable on it, may, with the consent of the holder, intervene and accept the bill supra protest for the honour of any party liable on it, and for the whole or part only of the sum for which it was drawn; but if the acceptance does not expressly state for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer. Such an acceptance to be valid must be written on the bill, indicate that it is an acceptance for honour, and be signed by the acceptor for honour.[1] An acceptor for honour engages to pay the bill on due presentment, according to the tenor of his acceptance, if it is not paid by the drawee, provided it has been duly presented for payment, and protested for non-payment, and that he receive notice of these facts. An acceptor for honour is liable to the holder and all parties subsequent to the party for whose honour he has accepted.

When a bill is dishonoured by the acceptor for honour, it must be protested for non-payment by him.

Payment for Honour—(sec. 68).—Where a bill has been protested for non-payment, any person may intervene and pay it supra protest for the honour of any party liable on it; such payment must be attested by a notarial act of honour founded on a declaration made by the payer for honour, or his agent in that behalf, declaring his intention to pay the bill for honour, and for whose honour

[1] For forms of acceptances for honour, see Appendix C, p. 337.

he pays.[1] Payment for honour discharges all parties subsequent to the party for whose honour it is paid, and the payer succeeds to both the rights and duties of the holder as regards the party for whose honour he pays and all parties liable to that party. The payer for honour, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonour, is entitled to receive both the bill itself and the protest. Where the holder of a bill refuses to receive payment supra protest, he loses his right of recourse against any party who would have been discharged by such payment.

Lost Bill—(secs. 69, 70).—If the holder loses a bill not overdue, he is entitled to another from the drawer upon giving a sufficient indemnity against other claims on the lost bill. In an action on a bill the Court or a judge may order that its loss shall not be set up, provided a satisfactory indemnity be given.

Bills in a Set—(sec. 71).—Where a bill is drawn in a set, each part of the set being numbered, and containing a reference to the other parts, the whole of the parts constitute one bill, and, subject to exceptions, discharge of one part is a discharge of the whole. The acceptance must be written on one part only, and a drawee who accepts more than one part is liable to different holders in due course as on separate bills. So an acceptor who pays without the delivery to him of the part signed by him, and that part at maturity is outstanding in the hands of a holder in due course, is liable to the holder of it. So an indorser of parts to different persons is liable on every such part. Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is, as between such holders, deemed the true

[1] For a form, see Appendix C, p. 341.

owner of the bill, but without prejudice to the rights of a person who in due course accepts or pays the part first presented to him.

Conflict of Laws—(sec. 72).—The validity of a bill as regards requisites in form is determined by the law of the place of issue; as regards requisites in form of acceptance, indorsement, or acceptance supra protest by the law of the place where such contract was made; but a bill issued out of the United Kingdom is not invalid merely because it is not stamped in accordance with the law of the place of issue; and if it conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment, be treated as valid between all persons who negotiate, hold, or become parties to it in the United Kingdom. The interpretation of the drawing, indorsement, acceptance, or acceptance supra protest is determined by the law of the place where such contract is made, but a foreign indorsement on an inland bill is to be interpreted, as regards the payer, according to the law of the United Kingdom. The duties of the holder as to presentment for acceptance or payment, and the necessity for or sufficiency of a protest or notice of dishonour, are determined by the laws of the place where the act is done or the bill is dishonoured.

Where a bill is drawn out of, but payable in the United Kingdom, and the sum payable is not expressed in English currency, the amount is, in the absence of express stipulation, to be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.

The date of a bill drawn in one country and payable in another is determined according to the law of the place where it is payable.

Cheques.—Section 60 and Part III. of the Act (sections

73 to 82), which relate to cheques on a banker, have been already dealt with at p. 164 and pp. 192–7.

Promissory Notes—(secs. 83 to 89).—A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to or to the order of a specified person or bearer.[1]

If the instrument is payable to the maker's order, it is not a note until it is indorsed by the maker.

An instrument purporting to be a joint and several promissory note contained, amongst other conditions, the following provision, viz., "that no time given to, or security taken from, or composition or arrangement entered into with either party hereto shall prejudice the right of the holder to proceed against any other party." It was held that the instrument remained a promissory note and a negotiable instrument within the meaning of the Act (*Kirkwood* v. *Carroll*, 1903, 1 K. B., 531).

A note may contain a pledge of collateral security, with authority to sell and dispose of such security.

A note is incomplete until delivered to the payee or bearer.

Where there are two or more makers, they are liable according to the tenor of the note.

Where a note runs "I promise to pay," and is signed by two or more persons, it is deemed to be their joint and several note.

If an indorsed note payable on demand is not presented for payment within a reasonable time of the indorsement, the indorser is discharged.

Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting

[1] For forms, see Appendix C, p. 342.

the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue.

Presentment for payment is not necessary in order to render the maker liable unless it is in the body of it made payable at a particular place, and then it must be presented at that place. Presentment is necessary in order to render an indorser liable.

The maker of a promissory note by making it engages that he will pay it according to its tenor, and is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

With the necessary modifications, provisions as to bills apply to notes, and the maker of a note corresponds with the acceptor of a bill, the first indorser of a note with the drawer of an accepted bill payable to drawer's order. The provisions in connection with acceptance do not apply to notes, nor those as to bills in a set; and a dishonoured foreign note need not be protested.

Good Faith—(sec. 90).—A thing is deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not.

Signature—(sec. 91).—A person may sign by an authorised agent.

CHAPTER XXII

MISCELLANEOUS SECURITIES

Exchequer and Treasury Bills.—An Exchequer bill is a kind of Government bill of exchange, payable at a fixed future day, bearing interest from day to day from the date of its issue. It is usual for the buyer to pay the accrued interest. The following is an example of the form of an Exchequer bill issued in the year 1836 :—

No. 8551, £1000.—By virtue of an Act, 6th and 7th Gulielm IV, Regis, for raising the sum of £14,007,950 by exchequer bills, for the service of the year 1836-7, this bill entitles ———, or order, to one thousand pounds, and interest after the rate of twopence halfpenny per centum per diem, payable out of the first aids or supplies to be granted in the next session of Parliament, and this bill is to be current and pass in any of the public revenues, aids, taxes, or supplies, or to account of His Majesty's exchequer at the Bank of England, after the 5th day of April 1837. Dated at the Exchequer this 19th day of December 1836. If the blank is not filled up, this bill will be paid to bearer. The cheques must not be cut off. J. Newport.

If the blank is not filled up, the bill is transferable by delivery. If the blank is filled up, it will not be paid without the indorsement of the person whose name appears in the blank.

It has already been said (p. 227) that an Exchequer bill is by the law merchant a negotiable instrument. Thus it appeared in the case of *Wookey* v. *Pole* (1820, 4 B. & Ald., 1) that an Exchequer bill, the blank in which

was not filled up, had been placed for sale in the hands of A. A, instead of selling it, deposited it at his banker's, who made him advances to the amount of its value. A afterwards became bankrupt, and the banker kept it to satisfy the balance of the overdraft on A's account. It was held that the owner of the bill who had placed it in A's hands could not sue the banker for it. Exchequer bills are now regulated by the Exchequer Bills and Bonds Act 1866 (29 Vict. c. 25). Treasury bills are another form of Government bill, and now issued under an Act of 1877 (40 Vict. c. 2).[1] An Exchequer bill may be current for five years, but a Treasury bill cannot be drawn payable more than twelve months from its date.

Dividend Warrants and Government Drafts.—A dividend warrant is an order issued by the Bank of England to their cashiers, ordering them to pay to the owner of Government stock so much money by way of dividend. These warrants were in some such form as the following, viz.—

120th No. 28,729. Reduced £3 per Cent. Annuities.
28,237.

To the Cashiers of the Bank of England.

Pay to Joseph Ashby Partridge,
The sum of thirty-seven pounds ten shillings,
£37, 10s. 0d.,

for half a year's annuity, which became due the 15th day of April 1841, on the sum of £2500 interest or share in the capital or joint stock of reduced annuities at £3 per cent. per annum, consolidated by Acts of Parliament of the 25th and 26th of George II and the 5th and 21st of George III, and by other subsequent Acts, charged on the Sinking Fund. J. Gretton.

End. W. Hill.

I do hereby acknowledge to have received of the Bank of England the above-mentioned sum, in full payment for half a year's annuity, due as aforesaid. Witness my hand this 6th day of April 1841.

Witness, G. Ellis. F. Wakefield, *Attorney.*

[1] A form of Treasury bill is given in the Appendix, p. 344.

It is a general rule for Government drafts to have a receipt attached to them, which the payee must fill up before demanding payment.[1]

Where the warrant or draft is made out merely to the payee as above, and without words making it payable to the assignee of the payee, the instrument is not negotiable, nor can any estoppel arise to that effect, as there is no representation on its face that it is transferable by delivery.[2] In the case of *Partridge* v. *Bank of England* (1846, 9 Q. B., 396), from which the above form of dividend warrant is taken, it was proved that one Wakefield had been authorised by Partridge to receive his dividends, that Wakefield, in fraud of Partridge, had given the warrant to his bankers for good consideration, and that the bankers had received credit for the warrant in their account with the Bank of England. Partridge sued the bank for the dividend due to him, and it was held that he could succeed. Partridge had never been paid, nor had he done anything which would preclude him from saying that he had been paid. It seems clear that the mere signing of the receipt is no ground of estoppel, as anybody taking the instrument after such signature takes it on the supposition that it has not been paid, and therefore the signature of the receipt cannot be a representation to any other effect than that the warrant has been in the hands of the person named in it; there is no representation that such person has parted with it, or authorised any one to demand payment of it.

It is the custom of the Bank of England to pay such drafts or warrants, when duly signed, to anyone who presents them; but they are not bound to do so, and they take upon themselves the risk of paying the wrong person.

[1] For a more modern form, see Appendix C, p. 343.

[2] The form in the Appendix is payable 'to bearer.'

By section 95 of the Bills of Exchange Act 1882 the provisions of the Act as to crossed cheques apply to a warrant for payment of dividend.

It is clear from the insertion of section 95 in the Act that a "warrant for payment of dividend" is not merely a form of cheque, for then the provisions of the Act would necessarily apply to such warrants. A dividend warrant, both in the form given above and in the form in the Appendix, is addressed by one agent of the Bank of England to other agents of the Bank of England, and would be on the same legal footing as a draft drawn by one branch bank on another branch bank, *i.e.* it is not an order addressed by one person to another, and is therefore clearly not a cheque (*Capital & Counties Bank* v. *Gordon*, 1903, A. C., 240).

Section 97 (3) (*d*) specially preserves the validity of any usage relating to dividend warrants, or the indorsements thereof.

Dividends on other than Government stock are generally paid by drafts, which are merely cheques in a more or less unusual form.

Post-Office Orders.—It is usual for customers to pay into their banking accounts post-office orders for the purposes of collection in the same way as cheques or bills. But it must be noted that such instruments are not negotiable (see pp. 227, 229), so that apart from Statute the banker gets no better title than the customer had.

The Post-Office (Money Orders) Act 1880 contains in section 3 a protection to bankers, which appears to have been lost sight of until recently brought to light by Sir John Paget (*Journal of the Institute of Bankers*, May 1907, pp. 285–7). That section, after attaching certain pains and penalties to the obliteration of the crossing ___ & Co. on a postal money order, goes on to say, "pro

vided that any banker or corporation or company acting as bankers in the United Kingdom who, in collecting in such capacity for any principal, shall have received payment or been allowed by the Postmaster-General in account, in respect of any money order issued under this Act, or of any document purporting to be such a money order, shall not incur liability to anyone except such principal by reason of having received such payment or allowance, or having held or presented such order or document for payment."

Sir John Paget appears to be absolutely correct in saying: "It takes away the remedy of the true owner altogether, and that not only in the case of a crossed postal money order, but in the case of one not crossed, and it covers all dealings with the money order or proceeds."

But the phrase in the Post-Office (Money Orders) Act 1880, "who, in *collecting* in such capacity for any principal, shall have received payment," raises the question of the part which is being played by the banker. That phrase would appear to be the equivalent of the phrase in section 82 of the Bills of Exchange Act 1882, on which the decision in Gordon's case (*Capital & Counties Bank* v. *Gordon*, 1903, A. C. 240) turned, viz., "receives payment for a customer." If that is so, the banker is only protected when he is collecting for a customer, and not when he has made himself a holder for value by crediting the postal money orders as cash.

Sir John Paget sums up thus: "Postal orders seem the ideal thing for a collecting banker to deal with in safety. You take them crossed or uncrossed, with or without negligence, and you are only liable to your customer, which comes to nothing, as you will have paid him or retained the money by virtue of set-off."

The Post-Office regulations with regard to post-office orders provide that, when presented for payment by a banker, they shall be payable without the signature by

the payee of the receipt contained in the order, provided that the name of the banker presenting the order is written or stamped upon it. In the case of the *Fine Art Society* v. *Union Bank of London Ltd.* (1886, 17 Q. B. D., 705), it appeared that the plaintiffs banked with the defendants, and that it was the duty of the secretary to pay all moneys received by him on behalf of the plaintiffs into the defendants' bank, to the credit of the plaintiffs. The secretary, without the knowledge of the plaintiffs, kept a private account at the defendants' bank. He paid into his private account post-office orders belonging to the plaintiffs, which the bank subsequently cashed. The plaintiffs sued the bank for the amount of the orders. It was argued on behalf of the bank that the plaintiffs were estopped from setting up their title because they entrusted to their secretary, for the purpose of their being paid into and cashed through a bank, instruments which in the hands of a banker become quasi-negotiable, as stating on their face that when presented by a banker they would be payable without the signature of the payee. They thus gave the secretary the means of committing this fraud, and of inducing the bank to collect the orders and hand over the proceeds to him, and therefore should bear the loss. The Court held otherwise, and decided that the bankers must bear the loss. It must be borne in mind that neither Counsel nor the Court seem to have been aware of the section of the Act of 1880 cited above, nor had the distinction drawn in Gordon's case been then established.

Bills of Lading.—(Leake, pp. 1195–1201; Smith's Leading Cases, vol. i., notes to *Lickbarrow* v. *Mason.*) A bill of lading is the document signed by the master of a ship upon the shipment of goods for carriage, acknowledging the receipt of the goods on board, and undertaking to de-

liver them to the consignee, "or to his order or assigns," upon payment of the freight therein stipulated for.[1] By the custom of merchants, a bill of lading is taken to represent the goods shipped, and the indorsement and delivery of the bill of lading by the shipper or owner of the goods transfers the property to the indorsee, and subsequent transfers by the indorsee of the bill of lading are equivalent to a transfer of the property in the goods.

The consignor may stop goods *in transitu* before they get into the hands of the consignee if the consignee has become insolvent; but if the consignee has assigned the bill of lading to a third person who takes it in good faith and for valuable consideration, the right of the consignor, as against such assignee, is divested, either wholly or partially, according as the arrangement was by way of sale or pledge (Sale of Goods Act 1893, sec. 47; see p. 281).

Bills of lading are usually drawn in sets of three, one of which is given to the master of the ship, another forwarded to the consignee, and the last kept by the consignor as a protection against fraud on the part of the master of the ship.

A banker does not become a holder of a bill of lading until it has been indorsed by the consignee, and in practice he takes it as security, either direct from a consignee who is a customer, or from some customer who has received it from the consignee.

The first question to be asked is, "When is a banker, who takes direct from the consignee, a holder for value?" Value in the case of a bill of lading is the same as in the case of bills of exchange and promissory notes, in that an antecedent debt or liability is a good consideration. Therefore a banker who takes a bill of lading to secure past advances is a transferee for value (*Leask* v. *Scott*,

[1] For specimens of bills of lading, see Appendix C, pp. 361–3.

1877, 2 Q. B. D., 376). In that case it appeared that Geen & Co., the consignees of goods, were indebted to Leask. On a Saturday they applied to Leask for a further advance, which he agreed to make on being first covered. Geen & Co. promised to give him cover (not naming anything in particular), and Leask advanced them a further sum of £2000, being content with their promise. On the following Tuesday the bill of lading of the goods in question, consigned by Scott to Geen & Co., came to the possession of the latter, who, on the following day, Wednesday, deposited it with the plaintiff in fulfilment of their promise to cover him. Geen & Co. stopped payment before the goods arrived, and Scott sought to stop the goods *in transitu*. The question raised was this: Was Leask a holder for value, inasmuch as the advance of £2000 having been made before the transference of the bill of lading, was a past consideration, and, as such, in general, incapable of supporting a contract? The Court of Appeal held that the consideration was good, as it had a present operation by staying the hand of the creditor. They said that to hold otherwise would make commercial law a tissue of niceties; for instance, in the present case Leask might have said, "I cannot take this bill of lading safely as the consideration would be past; do it with the broker next door, and give me his cheque," an arrangement that would have been valid. A banker will be safe in allowing his customer to overdraw on the faith of a promise to give cover, for the banker will take for value bills of lading subsequently handed over in pursuance of the promise; so, too, if a banker demands security for an account already overdrawn, bills of lading handed over in pursuance of such demand will be held for value. *A fortiori*, if a banker, in return for the transference of bills of lading, gives the customer some definite present benefit,

such as a promise to forbear from pressing or suing for past advances, or an actual advance, or the promise of future advances, the banker is a transferee for value.

A banker may fail to get a good title to a bill of lading on the ground that his customer had no title, or was not authorised to transfer. A bill of lading is not negotiable in the sense that the transfer of it to a *bonâ fide* holder for value can pass to such transferee a better title to the property represented by it than the transferor himself had. The bill of lading only represents the goods, and the transfer of a bill of lading only gives a title to the goods when an actual transfer of the goods under the same circumstances would give a title. As has been said, the rule of the common law is that, except by a sale in market overt, no one can give a better title to goods than he himself possesses. It has been accordingly laid down that although the shipper may have indorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him, or transferred without his authority, a subsequent *bonâ fide* transferee for value cannot make title under it as against the shipper of the goods (*Gurney* v. *Behrends*, 1854, 3 E. & B., 622). And the same principles apply in the case of subsequent owners who have been wrongfully deprived of the bill of lading.

Where, however, the bill of lading is in the possession of a person who, though not the owner of the goods, is in possession with the consent of the owner, then various statutory enactments protect a purchaser or pledgee who takes the bill of lading. Under section 25 of the Sale of Goods Act (see p. 280), and the Factors Act (see p. 293), where a purchaser, with the consent of the seller, obtains possession of the bill of lading, the transfer of the bill

of lading under any sale, pledge, or other disposition to any person receiving the same in good faith, and without notice of any lien or other right of the original seller in respect of the goods, is as valid as if the original purchaser had express authority to make the same.

It is not unusual to make the indorsement and delivery of a bill of lading conditional upon the acceptance of bills of exchange for the price of the goods, or some similar condition. This case is also now provided for by statute. Section 19 (3) of the Sale of Goods Act 1893 enacts that "where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and the bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading, the property in the goods does not pass to him."

This section only applies between seller and purchaser. A sub-purchaser who takes the bill of lading without notice, under section 47 of the Act (see p. 281) takes the goods free from the vendor's right of stoppage *in transitu*, and transfers under section 25 will also be effective to put an end to the vendor's right. "A sells certain copper to B, forwarding bill of lading indorsed in blank, and bill of exchange for acceptance. B, who is insolvent, does not accept the bill of exchange, but transfers the bill of lading to X in fulfilment of a contract to supply him with copper. X in good faith pays the price. A cannot stop the copper *in transitu*" (*Cahn* v. *Pocketts' Bristol Channel Coy.*, 1899, 1 Q. B., 643, as cited in Chalmers' Sale of Goods Act).

As bills of lading are very often drawn in parts, it is possible that different parts may come through fraud into

the hands of different *bonâ fide* holders for value. In such case it is always provided that one of the bills being accomplished, the other is to stand void. It has been decided "that the first person who for value gets the transfer of a bill of lading, though it be only one of a set of three bills, acquires the property; and all subsequent dealings with the other two bills must in law be subordinate to that first one, and for this reason, because the property is in the person who first gets a transfer of the bill of lading." But as regards the shipowner, or a dock company standing in the shoes of the shipowner, the law is that the shipowner is justified in delivering on production of one part, although there has been a prior indorsement for value to the holder of another part, provided the delivery be *bonâ fide*, and without notice or knowledge of such prior indorsement. In such a case the first indorsee has no remedy against the dock company or shipowner (*Glyn, Mills, Currie & Co.* v. *East and West India Dock Co.*, 1882, 7 A. C., 591). In that decision it was suggested that any inconvenience caused by such a rule could be remedied by a practice to sign only one original bill, and to take two certified copies to fulfil the function of the second and third parts; or by a bank or other person refusing to advance money until all the parts were brought in; or, thirdly, if a bank or other person had advanced money, by the lender being vigilant and on the alert, and taking care to be on the spot at the first arrival of the ship in dock.

According to the principle enunciated on p. 226 the contract contained in the bill of lading is not assignable at common law. But the Bills of Lading Act, 18 & 19 Vict. c. 111, provides—(1) that the rights of action and liabilities upon a bill of lading are to vest in and bind the consignee or indorsee *to whom the property in the*

goods shall pass; and (2) that a bill of lading in the hands of a consignee or indorsee for value without notice shall be conclusive evidence of shipment against the master or other person signing the same.

A mere indorsement and delivery of a bill of lading, by way of pledge to secure a loan, does not pass the property in the goods within the meaning of the Bills of Lading Act, so as to make the indorsee liable in an action by the shipowner for the freight, or in similar actions. This was decided in *Sewell* v. *Burdick* (1884, 10 Ap. Ca., 74). Lord Bramwell, in that case, said: "Consider what difficulties would be put on those who lend on such securities if an action for freight was maintainable. The banker who lent money on a bill of lading for goods which arrived in specie, but damaged by perils of the seas so as to be worthless, might lose the money lent and the freight. Another consequence would be, that the transferee of the bill of lading, though only interested to the amount of the loan on it, would be the person to bring actions on the contract to carry."

But the indorsee, by claiming and obtaining delivery of the goods for the purpose of realising them, quite independently of the statute, is held to undertake a new contract to pay the freight and damage, and any other charges stipulated for in the bill of lading.

Hypothecation Notes of Documentary Bills.—An explanation has already been given of documentary bills of exchange from the point of view of the collecting banker and the paying banker. But a banker may discount or purchase such bills of exchange. In such cases the banker becomes a pledgee of the bill of lading, and of the goods comprised therein, under a written document, generally known as a note of hypothecation,[1] and holds the bill of

[1] For a full form, see Appendix C, p. 375.

lading as security for the payment of the bill of exchange. Thus it appeared in the case of *Bristol & West of England Bank* v. *Midland Railway Co.* (1891, 2 Q. B., 653) that Clark, of Bristol, employed Hodgson in Canada to buy cheeses for him. Hodgson drew bills for the price on Clark, and in order to get his money at once he sold the bills to the Bank of Toronto, and gave as security the bills of lading made payable to consignor's order. The Bank of Toronto remitted the bills to the City Bank Ltd., London. The hypothecation note was as follows:—"We have this day sold to the Bank of Toronto a bill of exchange for £390, 4s. on Clark, Bristol, against a shipment of 208 boxes of cheese, ex 'Indiana,' Bristol. The agreement with the Bank of Toronto is, that the bills of lading are to be given up to Clark, Bristol, on payment, or banker's guarantee, without prejudice to your claim on us, in the event of the bill not being paid at maturity; but if they decline to accept, or if the acceptance is not satisfactory to you, or if the bill be not paid at maturity, then you are hereby authorised to retain the bills of lading, and at any time at your discretion to place the 208 boxes of cheese in the hands of your brokers for sale." The goods arrived in England, and were delivered to the Midland Railway Company to be delivered to the order of the shipowners. Clark paid the freight and other shipping charges and accepted the bills of exchange, but before the bills became due he induced the railway company to deliver the goods to him without producing a delivery order from the shipowners, which he could only have got by redeeming the bills of lading. When the bills of exchange became due, Clark requested the Bristol bankers to advance the money and take up the bills. They did so, and received the bills of exchange

and the bills of lading from the London bank, and ultimately obtained delivery orders from the shipowners in exchange for the bills of lading. When the Bristol bank presented the delivery orders to the railway company, they found that the goods had already been given up to Clark. They then sued the railway company for the value of the goods. It was held that the Bristol bank must be taken to be pledgees of the goods, and had therefore a property sufficient to entitle them to maintain the action independently of the Bills of Lading Act.

Other Documents of Title.—For a definition of the documents of title which come within the provisions of the Sale of Goods Act and the Factors Act see p. 281, where the Factors Act is dealt with. Here it is only necessary to treat of the common law rule and two sections of the Sale of Goods Act, viz. sections 25 and 47, which apply to documents of title generally, as well as to bills of lading.

"As regards documents of title, the common law drew a hard and fast distinction between bills of lading and other documents. The lawful transfer of a bill of lading was always held to operate as a delivery of the goods themselves, because while goods were at sea they could not be otherwise dealt with. But the transfer of a delivery order or dock warrant operated only as a token of authority to take possession, and not as a transfer of possession; and, as between immediate parties, there is nothing to modify the common law rule" (Chalmers' Sale of Goods Act).

Section 25 of the Sale of Goods Act runs as follows:—

"(1) Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or

by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

"(2) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

"(3) In this section the term 'mercantile agent' has the same meaning as in the Factors Acts."

Section 47 enacts as follows:—

"Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage *in transitu* is not affected by any sale or other disposition of the goods which the buyer may have made unless the seller has assented thereto: Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien, or retention, or stoppage *in*

transitu is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien, or retention, or stoppage *in transitu* can only be exercised subject to the rights of the transferee."

Dock Warrants and Delivery Orders.—A dock warrant is a receipt given by the owners of a dock to the effect that certain specified goods stand in their books in the name of a specified person, coupled with an order to deliver the goods to or to the order of the person specified.[1] The rightful possession of a dock warrant is equivalent to the rightful possession of the goods mentioned in the warrant. But as, in the case of a bill of lading, the warrant only represents the goods, and a person who, if in possession of the goods, could not give a title to them, does not by the indorsement and delivery of a dock warrant give the indorsee any title. In the case of *Johnson* v. *Credit Lyonnais* (1877, 3 C. P. D., 32) it appeared that H., a merchant dealing in tobacco, and a broker in that trade, had fifty hogsheads of tobacco lying in the bond in his name in the K. dock. The warrants for them had been issued to him. Johnson bought the tobacco from H. and paid for it, but he left the dock warrants in the possession of H. and took no steps to have any change made in the books of the Dock Company as to the ownership of the tobacco. H. being the ostensible owner of the tobacco, fraudulently obtained advances by a pledge of the tobacco. It was held that the case did not come within the existing Factors Acts (they have since been amended to cover this case), and by the rules of the common law H. could not pass a better title to the tobacco than he himself had; nor was the conduct of Johnson in leaving the indicia of title in H.'s hands, thus enabling

[1] For a form of dock warrant, see Appendix C, p. 367.

him to obtain advances on the security of the goods, such as to disentitle Johnson to recover the value of the tobacco from the pledgee.

A delivery order by itself is merely a means towards obtaining either a dock warrant or actual possession.[1] Thus, in the case of the *Imperial Bank* v. *London & St Katharine's Dock Company* (1877, 5 Ch. D., 195), it appeared that, according to the usage of the London dry goods market, a broker who contracts for the sale of goods without disclosing his principals is personally liable in default of his principal. On March 3rd, certain goods belonging to C, lying at the dock in the custody of the Dock Company, were bought by D, as broker for buyer and sellers, of C for B & Co., without disclosing the names of his principals, B & Co., and D indorsed to B & Co. the delivery order he had obtained from the seller on the representation that the goods were wanted for immediate shipment. B & Co., however, pledged their interest in the goods to the bank, and indorsed the delivery order to them. On March 18th, the prompt day, a clerk from the bank lodged the delivery order at the London office of the Dock Company, with this memorandum, "Hold within to our order, and have warrants made out as soon as possible." He was told that the warrants would be ready with the goods on March 20th. Three hours later, a messenger from the London office reached the warrant office at the dock house with a notice that the order had been lodged. Meanwhile B & Co. had stopped payment, and D being so informed, and having no notice of the title of the bank, on the same day paid C for the goods, and through a clerk, who reached the dock house before the messenger had arrived, obtained at the warrant office a warrant for the goods in the name of

[1] For a form of delivery order, see Appendix C, p. 369.

C. C then indorsed the same to D, and gave him a second delivery order. The first delivery order was returned to the bank by the Dock Company, who refused to act upon it. The bank claimed the goods. It was held that D was the surety, and B & Co. the principal debtors; that the unpaid vendor's lien had passed to D, and that the title to the goods was in D, and not in the bank. In the course of his judgment, Jessel, M.R., said: "What was the position of the bank? They had a modified ownership in the goods, but they were not the actual owners. They were pledgees of the goods. They were armed with the delivery order, and they had a right to require one of three things from the Dock Company. They might go to the Dock Company and say, 'Here is our delivery order; deliver us the goods standing in the name of C,' who had given a delivery order. Of course, if nothing had intervened, that is, if there had been no stop, and nothing to prevent the Dock Company delivering the goods, they would have delivered the goods; they would have been carted away, and there would have been an end of it. Or they might say to the Dock Company, 'We do not want you to deliver the goods; we want you to hold them for us, and be our bailees (that is, instead of making actual delivery), and so to make a constructive delivery to us by entering them in our name in your books, by which we should become owners to the same extent as if they had been delivered to us, and you to be our warehousemen or bailees of the goods for us.' Or they might have superadded to this second proposal a third thing, and might have said, 'Besides entering our names in your book, give us a dock warrant, which will show our title to the goods, and enable us to confer a title, by indorsement, on the buyer of the goods.' What is the effect of bringing the delivery order to the office?

It seems to me that it does not transfer the property in the goods. . . . There is no delivery of constructive possession until the delivery order gets down to the docks, and is recognised by an entry in the dock books."

Iron Warrants.—An iron warrant is a document issued by an ironmaster to a purchaser to enable the latter to sub-sell before delivery of the iron. Apart from sections 25 and 47 of the Sale of Goods Act 1893, given above, the sub-purchaser will not be able to claim delivery of the iron free from vendor's lien unless there has been some representation on the part of the ironmaster that he will not insist on his lien as against a sub-purchaser who produces his iron warrant (*Merchant Banking Company* v. *Phœnix Bessemer Steel Coy.*, 1877, 5 Ch. D., 205). This case has already been dealt with at p. 225. There the warrants were for iron "deliverable (f.o.b.) to Smith & Co., or their assigns, by indorsement thereon." The warrants came into the hands of the plaintiffs, who were bankers, as securities for bills accepted by the bankers on behalf of their customers, Smith & Co. Smith & Co. had not paid for the iron. It was proved that, by the usage of the iron trade, any man who gave such a warrant understood that it would pass from hand to hand for value by indorsement, and that the indorsee was to have the goods free from any vendor's claim for purchase money. The Court held that the bankers were entitled to the iron free from the vendor's claim. Whether any estoppel would arise against an intermediate owner who had lost such warrants, or from whom they had been stolen, is a more difficult question, on which there are no authorities other than those relating to securities for money given on pp. 235–7.

It would give an incomplete view of the position of

these documents if no reference was made to the case of *Dixon* v. *Bovill* (1861, 3 Macq., 1). This was a decision of the House of Lords in 1866, on the effect of an instrument given by an ironmaster to his vendee in these words, "I will deliver 1000 tons of iron when required, after Sept. 18th next, to the party lodging this document with me." No evidence of the practice or usage of the iron trade was given. The only point decided was that the instrument was not negotiable. If the case was re-argued to-day, the plaintiff's case would be that, as in the case last quoted, the ironmaster was estopped from setting up his vendor's lien. But it does not necessarily follow that the decision would be different now, unless evidence of trade usage was brought forward, for there were no words expressly making the contract assignable free from equities, and there was no evidence of a trade usage which could import by implication the required meaning into that phrase.

Letters of Lien.—It is the practice of a certain class of bankers to finance traders by advances against each separate transaction of the traders. There are various devices in use to secure the position of the bankers. The following letter was held to constitute a good security:—"We beg to advise having drawn a cheque for £ , which amount please place to the debit of our loan account, as a loan on the security of goods in course of preparation for shipment to the East. As security for this advance, we hold on your account, and under lien to you, the under-mentioned goods in the hands of [*here followed list of goods and names of bleachers*] as per their receipt inclosed. These goods, when ready, will be shipped to Calcutta, and the bills of lading, duly indorsed, will be handed to you, and we then undertake to repay the above advance. . . . "

(In re *Hamilton, Young & Co.*, 1905, 2 K. B., 772).[1]

The traders who gave this letter became bankrupt, and the trustee in bankruptcy disputed the bank's title on two grounds, (*a*) that the letter constituted a bill of sale, and not being in the prescribed form, and being unregistered, was void, and (*b*) that the goods were in the order and disposition of the traders as the reputed owners thereof, within section 44 of the Bankruptcy Act 1883. It was held, both in the Court of first instance and in the Court of Appeal, that the letter was a "document used in the ordinary course of business as proof of the control of goods," and therefore not within the Bills of Sale Act, and also that the goods were not "in the order and disposition" of the traders.

Bigham J. said, "This document evidences a transaction of the most ordinary kind as between bankers and merchants. Such transactions happen by the score every day of the week in places of business like Manchester."

Assignments of Purchase Moneys.—Another device is to get the trader, the banker's customer, to assign to the bankers the purchase money of the goods sold by him so that the bankers are entitled to receive it from the purchaser as a repayment of the loan to the trader, and can sue the purchaser direct. In the case of *Brandt* v. *Dunlop Rubber Co.* (1905, A. C., 454), Lord Macnaghten, in the House of Lords, laid down the rule that to constitute a good equitable assignment of a debt, all that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person, and if the debtor ignores such a notice he does so at his peril.

[1] For further details of the documents in this case, see Appendix C, pp. 379–381.

In this case merchants agreed with a bank by whom they were financed that goods sold by the merchants should be paid for by remittance direct from the purchasers to the bank. Goods having been sold by the merchants, the bank forwarded to the purchasers notice in writing that the merchants had made over to the bank the right to receive the purchase money, and requested the purchasers to sign an undertaking to remit the purchase money to the bank. It was held that there was evidence of an equitable assignment of the debt to the bank with notice to the purchasers, and that the bank could recover the debt from the purchasers.[1]

Life Insurance Policy.—A creditor may insure his debtor's life for the amount of his debt, but, except in unusual circumstances, there is not much object in doing so, as on the average the premiums will in the long-run more than equal the money insured. But a well-matured life policy is an asset of value, and may be deposited by the customer by way of equitable mortgage, or may be legally mortgaged by deed. Notice in writing of the mortgage should be given at once to the insurance company, under the provisions of the Policies of Assurance Act 1867.[2]

In dealing with life interests or reversionary or contingent interests, a policy of insurance is an essential part of the transaction. For instance, A is entitled to £300 a year for life, and wants to borrow £2500. If it is assumed that the premium on a policy for that amount is £60 per annum, and if interest at 4 per cent. per annum is charged, the payment of £160 per annum out of the £300 will secure 4 per cent. interest during

[1] For further details of the documents in this case, see Appendix C, pp. 381–2.

[2] For form of notice, see Appendix C, p. 382.

the borrower's life and the return of the capital at the borrower's death. Or, again, suppose A, who is 23 years of age, will be entitled to £50,000 if he lives to be 25, and wishes to have an advance of £10,000. The lender can safely advance this if he effects by a single payment premium a policy on the borrower's life for two years, sufficient to recoup him the advance, with compound interest, and also the premium, and takes a charge on the borrower's contingent interest for a like amount. The lender is then secure, whether the borrower attains 25 and receives his fortune, or dies under 25. These loans are for the most part effected by insurance companies themselves, for reasons which are obvious.

CHAPTER XXIII

THE FACTORS ACTS

A FACTOR is an agent entrusted with goods for the purpose of selling them for his principal. Originally, a factor did not, as a matter of mercantile usage, deal with the goods entrusted to him otherwise than by selling them. Later it became a usual and accustomed course for factors entrusted with goods for sale to make advances to their principals, either in money or by the acceptance of bills, against their consignments, and to keep themselves in funds by repledging the documents of title with bankers or other money-dealers. The courts of law, however, continued to hold that a pledge was out of the scope of an authority to sell, and that, therefore, a pledge by a factor, not being an act within the limits of his ostensible authority, did not bind his principal.

To remedy this difference between law and mercantile usage, the law was altered by two Acts of the year 1823. Those Acts gave rise to several difficult questions, and in the year 1842 a further Act was passed. In 1877 it was found advisable to make special enactments as to revocation of agency, and as to unauthorised dealings of vendors and vendees with documents of title in their possession. In the year 1889 all these Acts were consolidated and

amended by the Factors Act 1889. A summary of this Act is now given.

Definition of Mercantile Agent.—A mercantile agent means one who has, in the customary course of his business as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.

Definition of Document of Title.—Documents of title include any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising, or purporting to authorise, either by indorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

Definition of Pledge.—A pledge includes any contract pledging or giving a lien or security on goods, whether in consideration of an original advance, or of any further or continuing advance, or of any pecuniary liability.

Validity of Disposition of Goods by Agent.—The first case of the disposition of goods dealt with is the disposition of them by a mercantile agent who is, with the consent of the owner (which consent is presumed in the absence of evidence to the contrary), in possession of goods or documents of title to goods. Any sale, pledge, or other disposition of the goods by such agent, in the ordinary course of his business, is as valid as if the agent had express authority to make the same, provided that the person taking under the disposition acts in good faith, and has no notice at the time of the disposition of an actual absence of authority in the agent to make the disposition.

The second case dealt with is where the agent has been in possession with the consent of the owner, and the con-

sent has been determined. Any disposition by such agent, which would have been valid if the consent had continued, is still to be valid, provided that the person taking under the disposition has no notice at the time of it of such determination.

A mercantile agent often, as the result of holding goods or documents of title, obtains further documents. For instance, as holder of a bill of lading, he may get a dock warrant. In such cases, if he was in possession of the first goods or documents of title with the consent of the owner, he is also deemed to hold derivative documents with the consent of the owner.

Pledges of Documents.—A pledge of the documents of title to goods is deemed a pledge of the goods.

Pledge for Antecedent Debt.—It should be very carefully noted that under the Act, where a pledge of goods is taken as security for past advances or liabilities, the pledgee acquires no further right to the goods than could have been enforced by the pledgor at the time of the pledge.

Consideration.—The consideration necessary to support a sale, pledge, or other disposition of goods may be a payment in cash, the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security; but in all cases, except that of a cash payment, the pledgee acquires no right or interest in the substituted goods in excess of the value of the goods, documents, or security when so delivered or transferred in exchange.

Consignor apparent Owner.—Where the consignor appears as owner, and the consignee has no notice to the contrary, the consignee, in respect of advances made to or for the use of such consignor, has the same lien on the goods as if the consignor were the owner of the goods, and may transfer any such lien to another person.

Dispositions by Seller in Possession.—Where a person,

having sold goods, continues or is in possession of the goods, or of documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition, or any agreement for a sale, pledge, or other disposition, to any person receiving the same in good faith and without notice of the previous sale, has the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same. See section 25 of the Sale of Goods Act 1893, pp. 280–1.

Dispositions by Buyer in Possession.—When a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition, or under an agreement for a sale, pledge, or disposition of them, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner. See section 25 of the Sale of Goods Act 1893, pp. 280–1.

Vendor's Lien.—Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes it in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in*

transitu. See section 47 of the Sale of Goods Act 1893, pp. 281–2.

Rights of Owner.—The owner may redeem the goods, and may recover from any person with whom the goods have been pledged any balance of money remaining in his hands as the produce of the sale of the goods after deducting the amount of his lien.

CHAPTER XXIV

SECURITY FOR FLOATING BALANCES

Bank Mortgages.—The usual form in which a bank takes a legal mortgage from a customer is in the form of a mortgage for past and future advances, not exceeding a fixed sum. Such a mortgage is a valid security for the floating balance, provided that the mortgagor has not given a subsequent mortgage of which the bank has notice. It was for a long time supposed that, within the fixed limit, the bank obtained priority notwithstanding notice of the subsequent mortgage, but in the year 1865 the House of Lords laid down the rule that a first mortgagee for present and future advances is not, as against a second mortgagee, entitled to priority in respect of advances made by him after notice of the second mortgage (*Hopkinson* v. *Rolt*, 1861, 9 H. of L. Ca., 514).

Legal Estate.—The advantage of taking a legal mortgage as against a mere equitable mortgage (*e.g.* a deposit of title-deeds) is that a legal mortgagee in general has priority over equitable mortgagees, even if prior in date. "A legal mortgagee who makes an advance without notice of a prior equitable title is a purchaser for value without notice. From such a purchaser a Court of Equity takes away nothing which he has honestly acquired" (*Taylor* v. *London & County Banking Co.*, 1901, 2 Ch., 231, at

p. 256). But a legal mortgagee who has been grossly negligent will not get priority over a prior equitable mortgagee of whose mortgage he might have had notice but for his negligence (*Oliver* v. *Hinton*, 1899, 2 Ch., 264). In that case the owner of property deposited the deeds as security for an advance. He then sold to a purchaser, who was advised by an agent who was not a solicitor. The agent never asked to see the deeds, but was content with an assurance that they related to other property as well, so could not be handed over. It was held that the purchaser did not get priority over the equitable mortgagee.

A first mortgagee, whether he is taking a legal or an equitable title, should obtain the title-deeds and keep possession of them.

Mortgage by Deposit.—A mere deposit of title-deeds is sufficient to create an equitable mortgage. But in order that there may be no ambiguity about the terms of the deposit, and to make certain that the rule in Clayton's case (see p. 123) is excluded, it is always advisable to have a memorandum of the terms.[1]

Legal Incidents of Mortgages.—"A mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt, or the discharge of some other obligation for which it is given; and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. . . . Any provision inserted to prevent redemption, or payment, or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption, and is therefore void" (cited in *Noakes* v. *Rice*, 1902, A. C., 24, at p. 28). The property comprised in a mortgage is redeemable by

[1] For forms of memorandum of deposit, see Appendix C, p. 370.

the mortgagor until the mortgagee has himself become the owner, under a decree of the Court for foreclosure, or has sold the property to a purchaser, under a power of sale. A mortgage by deed carries with it a power of sale. If the mortgage is by deposit, the Court can order a sale.

A mortgagee may go into possession of the mortgaged property, but as he incurs serious liabilities, it is not generally advisable for him to do so; for he is then compelled to keep a strict account of the rents and profits, and when he has received so much as will suffice to repay him the principal money lent, together with interest and costs, he will be compelled to reconvey the estate to his former debtor.

Deposit of Land Certificate.—When the title to land has been registered, the land certificate issued from the land registry office takes the place of title-deeds. The Land Transfer Act 1897, sec. 8, enacts that the registered proprietor of any freehold or leasehold land or of a charge may, subject to any registered estates, charges, or rights, create a lien on the land or charge by deposit of the land certificate, or office copy of registered lease, or certificate of charge; and such lien shall, subject as aforesaid, be equivalent to a lien created by the deposit of title-deeds, or of a mortgage deed of unregistered land, by an owner entitled in fee-simple or for the term or interest created by the lease for his own benefit, or by a mortgagee beneficially entitled to the mortgage.

"The deposit can be protected by notice to the registrar, and the entry of such notice will operate as a caution. So long as such notice is on the register, no new certificate will be issued without notice similar to that under a caution" (Coote on Mortgages, 7th ed., p. 73).

Compound Interest.—If a banker, instead of taking a

mortgage for the balance of the customer's running account, takes a mortgage for a fixed sum, say the amount of the balance at a given date, he must not afterwards mix the banking and mortgage accounts. It is usual, as between banker and customer, to strike balances, after adding interest and charges, each half-year (or at other convenient periods), and this is, of course, equivalent to charging compound interest with half-yearly rests. But a mortgagee is not entitled, except by express agreement, to charge compound interest. Therefore, when the mortgage is for a fixed sum, and there is no special agreement, the fixed sum and the simple interest on it must not be introduced into the banking account, but must constitute a separate account; and as to such an account, the relation of the parties is no longer that of banker and customer, but that of mortgagee and mortgagor (1863, *Mosse* v. *Salt*, 32 L. J., Ch., 756).

Sale by Owner of Mortgaged Premises.—The principle of *Hopkinson* v. *Rolt* (see p. 295), applies equally to legal and equitable mortgages, and to subsequent interests acquired either by mortgage or sale. Thus a purchaser who buys subject to a bank mortgage has priority over advances made by the bank after they have knowledge of the purchase (*London & County Banking Company* v. *Radcliffe*, 1881, 6 A. C., 722). In that case the facts were as follows: The owner of land had deposited his title-deeds with a bank as security for all sums then or thereafter to become due on the general balance of his account with the bank. Subsequently the landowner contracted, with the knowledge of the bank, to sell the land to a purchaser who had notice of the terms of deposit. The vendor afterwards paid into his own account at the bank sums which in the whole exceeded the debt due to the bank

on his balance at the time of the contract of sale, so that, on the principle of Clayton's case, that debt was discharged. The bank, without giving notice to the purchaser, continued the account, and made fresh advances to the vendor, so that on the general balance there was always a debt to the bank. The purchaser, who never had notice of the fresh advances, paid the purchase money by instalments to the vendor. The bank sought to enforce their equitable charge for the amount of the current balance. The House of Lords held, affirming the decision of the Court of Appeal, that, on the principle of *Hopkinson* v. *Rolt*, the bank had no charge on the land as against the purchaser for the fresh advances; and also that the bank had no charge upon the purchase money. Lord Blackburn, in further discussing the effect of a pledge by an unpaid vendor of his lien on the land, with notice of such pledge given to the purchaser, said: "A purchaser of land, with notice that the title-deeds have been deposited with the bank as security for the general balance on the vendor's present and future account, is not bound to inquire whether the bank has, after notice of the purchase, made fresh advances. The burden lies on the bank advancing on the security of the unpaid vendor's lien to give the purchaser notice that it has so done, or intends so to do."

Advances on Security of Shares in Limited Companies. —Sometimes a bank is in the position of a second incumbrancer, and then it gets the benefit of the principle of *Hopkinson* v. *Rolt*. Thus, that principle has been held to apply to advances by a bank on the security of shares in a limited company on which the company has a lien for debts due to it from the shareholder. For instance, in the case of the *Bradford Banking Company Limited* v. *Briggs* (1886, 12 A. C., 29), it appeared that, by the

articles of association of the defendant company, the company had "a first and permanent lien and charge, available at law and in equity, upon every share for all debts due from the holder thereof." A shareholder deposited his share certificates with the plaintiffs as security for the balance due and to become due on his current account, and the plaintiffs gave the defendants notice of the deposit. The certificates stated that the shares were held subject to the articles of association. It was held by the House of Lords that the defendants could not, in respect of moneys which became due from the shareholder to the company after notice of the deposit with the bank, claim priority over advances by the bank made after such notice, but that the principle of *Hopkinson* v. *Rolt* applied. The House of Lords further held that the notice to the company of the deposit with the bank was not a notice of a trust within the meaning of the Companies Act 1862, s. 30,[1] and that the bank, by giving notice of the deposit, did not seek to affect the company with notice of a trust, but only to affect the company in their capacity as traders, with notice of the interest of the bank.

[1] Now section 27 of the Companies (Consolidation) Act 1908.

CHAPTER XXV

SHARES AND DEBENTURES

Shares.—Shares may be taken as security for an overdraft of the customer, so that the banker becomes either the legal or equitable holder of them.

A banker does not become the legal owner of shares taken as security until he has completed his title by becoming the registered owner of them, or until he has at least "a present absolute and unconditional right to registration" (*Ireland* v. *Hart*, 1902, 1 Ch., 522); but once registered, he is, as between the company and himself, the sole owner of the shares, and he will be liable as a contributory. If the bank is a partnership, one partner in the firm has authority to take a transfer of shares as security for a loan. Even if the loan is paid off and the shares re-transferred, the bank is, for one year from the date of such re-transfer, liable, as a past member, to be made a contributory.

If the registration of the shares has never been completed through the default of the company, the liquidator cannot obtain a rectification of the register, so as to place the bank on the list of contributories.

A certificate is not like a promissory note; it does not transfer a chose in action, it is only a representation (In re *Ottos Kopje Diamond Mines Ld.*, 1893, 1 Ch., 618, at

p. 628). A deposit of share certificates is enough to give a bank which advances money on them a good equitable title.

Shares have been held to be choses in action, and therefore do not come within the order and disposition clause of the Bankruptcy Act (*Colonial Bank* v. *Whinney*, 1886, 11 A. C., 426).

Blank Transfers.—Shares in companies are transferable.[1] In the case of companies incorporated by Act of Parliament to which the Companies Clauses Consolidation Act 1845 applies (*e.g.* railway companies) the transfer must be by deed. In the case of companies registered under the Companies Act 1862, the mode of transfer is laid down in the articles of association. In some cases the shares will be transferable by writing under the hand of the shareholder, in others by deed.

The usual way of giving security upon shares is for the mortgagor to execute a blank transfer, which he deposits with the bank or other mortgagee along with the share certificates. The blank transfer is given to enable the banker to turn his equitable interest into a legal interest by filling up the blank transfer with his own name, and thus getting a registration of the shares in his own name. By the execution of the transfer the mortgagor is under an implied obligation, arising from the relation of grantor and grantee, constituted between the parties by the transfer, not to prevent or delay the registration of the transferee as owner of the shares (*Hooper* v. *Herts*, 1906, 1 Ch. 549). But if the shares can only be transferred by deed, then a blank transfer, after being filled up by the mortgagee, is not the deed of the mortgagor, and is ineffective to transfer the mortgagor's legal interest. But a blank transfer accompanied

[1] For forms of transfer, see Appendix C, p. 350.

by a deposit of the certificate is generally effective to pass the mortgagor's interest, and to prevent subsequent equitable mortgagees from him getting priority. But unless the mortgagee or person deriving title from him has become the legal owner of the shares, a prior equitable title is not displaced (*Powell* v. *London & Provincial Bank*, 1893, 2 Ch., 555, and *Peat* v. *Clayton*, 1906, 1 Ch., 659). In the former case the prior equitable title was vested in the beneficiaries under a trust, and in the latter case in the trustee of a deed of arrangement executed by the transferor.

A banker or other mortgagee cannot give a better title than he has himself got, and therefore, if the mortgagee fills up the blanks with the name of a purchaser from him, such purchaser will take no greater interest in the shares than the mortgagee had. In *Fry* v. *Smellie*, 3 K. B., 1912, p. 282, Farwell, L. J., said (at p. 297): "A man who creates an equitable charge on his shares by such deposit and blank transfer holds out nothing. He gives the mortgagee an equitable title, with power to complete his legal title, and to deal with that when completed; but he gives him no authority or right over any equitable interest, except to the extent of his own mortgage."

Forged Transfers and Certificates.—The essence of a transfer is that the person entitled to the shares should have agreed to the transfer of them, and therefore, if a transfer is forged, the transferee, though registered, has no title to the shares. But a certificate which has been issued on the strength of a fraudulent transfer may be binding by estoppel on the company. Such a certificate is not a warranty of title, but it estops the company from disputing a purchaser's right to be registered; and if the company cannot register the purchaser as shareholder in respect of the shares comprised in the certificate, it must

pay him as damages the value of the shares at the time of refusal to register (In re *Ottos Kopje Diamond Mines Ld.*, 1893, 1 Ch., 618).

In the absence of evidence to the contrary, a secretary of a company will be held to have no authority to do more than the mere ministerial act of delivering share certificates, when duly made, to the owners of shares (*Ruben* v. *Great Fingall Consol. Ld.*, 1904, 2 K. B., 712). In that case the secretary had issued to himself a forged share certificate, on which the plaintiffs lent £20,000. It was held that the defendant company were not estopped by the forged certificate from disputing the plaintiff's claim, or responsible to them for the secretary's wrongful action.

A bank which sends in for registration a transfer of stock which bears a forged signature must indemnify the corporation or company which has acted on the assumption that the transfer was genuine (*Lord Mayor of Sheffield* v. *Barclay*, 1905, A. C., 392).

Certified Transfers. — Transfers are very commonly sent into the company's office to be "certified." This certification is a note made by the company's secretary on the transfer, that the certificates for the shares dealt with by the transfer have been deposited at the company's office. In a recent case Joyce J. said: "As I understand this note, it only amounts to a representation that a document has been lodged with the company, apparently in order, and showing, *prima facie*, that the transferor is entitled to the shares, but it is no warranty of the transferor's title to the shares, or as to the validity of any of the documents, or that the company has received no notice in lieu of distringas, or any other notice affecting the matter" (*Peat* v. *Clayton*, 1906, 1 Ch., 659, at p. 665). If a company permits its secretary to certify transfers of shares, it

does not thereby authorise the secretary to do more than give a receipt for certificates of shares which are actually lodged in the office. If the secretary gives a receipt or an acknowledgment for certificates which have not been lodged, the company is not estopped from setting up the true facts (*Geo. Whitchurch Ld.* v. *Cavanagh*, 1902, A. C., 117).

Examples.—In the case of *France* v. *Clark* (1884, 26 Ch. D., 257) the facts were as follows: France was the registered owner of ten fully paid-up shares in the Anglo-Egyptian Banking Company. France, in February 1881, deposited the certificates, together with a transfer of the shares executed by himself, in which the date, the name of the transferee, and the consideration were left in blank, with Clark as security, for a loan of £150. Clark deposited the certificates and the blank transfer with Quihampton as security for £250 lent by him to Clark. In April, Clark died insolvent. In June, Quihampton filled up the blanks in the transfer, and was registered as owner of the shares. It was disputed whether the registration did or did not take place before the company received notice of France's right of redemption. The question of law was this: Could Quihampton hold the shares as security for the £250 he had advanced, or only for the £150 which his immediate predecessor in title, Clark, had advanced? It was decided that he could only hold the shares as security for £150. Lord Selborne said, as to a person who takes a blank transfer, "that he must necessarily have had notice that the documents required to be other than they were when he received them in order to pass any other or larger right or interest, as against the person whose name was subscribed to them, than the person from whom he received them might then actually and *bonâ fide* be entitled to transfer or create; and if he makes no inquiry, he must

at the most take that right (whatever it may happen to be), and nothing more." As to the authority given with a blank transfer, Lord Selborne said: "It was said that when a man, in a transaction for value, does what France did, and delivers a blank form of transfer to a creditor by way of security, together with the certificates of shares, his meaning must necessarily be that the creditor may complete his security by obtaining registration of the shares, either in his own or (possibly) in some other name, and that he therefore entrusts him with the requisite authority for that purpose. Granting this, what follows? Only that the creditor to whom such an authority is given may execute it or not, for the purpose of giving effect to the contract in his own favour, as he pleases; but not that, if he does not execute it, he can delegate the like authority to a stranger for purposes foreign to, and possibly (as in this case) in fraud of, the contract." As to any estoppel which might arise from the fact that France had by the blank transfer and certificate enabled Clark to represent himself as the true owner of the shares, Lord Selborne said: "Apart from the fact that the documents themselves showed that Clark was not the owner, and therefore could not be the ground of a representation to that effect, there was no evidence of any mercantile usage to the effect that blank transfers, accompanied by certificates of shares registered in the names of transferors, pass from hand to hand like negotiable instruments. A plea of such mercantile usage had been originally put upon the defence, and subsequently abandoned."

In the case of the *Société Générale de Paris* v. *Walker* (1885, 11 A. C., 20) there was a conflict between two equitable titles. J. M. Walker had given J. S. Walker certificates for a hundred shares in the Tramways Union

Limited, together with a blank transfer, as a security for a debt. J. M. Walker subsequently gave another blank transfer of the same shares to the plaintiffs as security for another debt, and in that transaction alleged that the certificates had been lost or mislaid. The articles of association of the company were, as to transfer, in the common form. The plaintiffs filled up the blank transfer, but as the company was not promised a sufficient indemnity against the consequences of registering without the production of the certificate, the transfer was never registered. The plaintiffs, therefore, never got a legal title, nor was their equitable title so good as J. S. Walker's. The latter was first in point of time, and was in possession of the certificates, which on their face stated that there should be no change of the registered title without the production of the certificates. Nothing more could be necessary, on any reasonable or intelligible principle, to perfect their equitable title, which they were under no obligation to convert into a legal title by registration.

It may be noted, in connection with this case, that in the case of shares of companies under the Companies Acts, as no notice of trusts can be entered on the register, and it is generally provided in the articles that the company will not be bound by trusts, it is not, as a rule, necessary to give notice of an equitable assignment in order to keep priority over subsequent equitable assignees, and the same principle applies where a trustee who is the registered owner commits a breach of trust. In *Powell* v. *London & Provincial Bank*, cited above, the facts were that the trustee deposited the stock certificate and a blank transfer with his bankers as security. The transfer had to be under seal. The bank filled up the blank transfer, and the transfer was duly registered, but as the transfer was

held to be ineffective, the bank's title was postponed to the prior equitable title of the persons interested under the trust.

In the case of the *Colonial Bank* v. *Whinney* (1886, 11 A. C., 426) there had been an equitable mortgage to the bank by deposit and blank transfer of certain shares in a Scotch company. The mortgagor became bankrupt, and his trustee in bankruptcy claimed the whole interest in the shares on the ground that they were still in the reputed ownership of the registered owner. Such shares were only transferable by deed. As to the blank transfer, Lord Blackburn said: "It was inoperative as a transfer, but was evidence that the deposit of the certificates was intended to be as a security." As to the reputed ownership, he referred to the usual note on the certificate itself as to production, and to the custom of the Stock Exchange, and said: "It was clear that anyone who was about to give credit to the bankrupts as being the owners of the entire interest in those shares ought to know that he had no legitimate ground for believing that they were such owners of the whole interest, unless the certificates were produced or accounted for, and that therefore in this case the bankrupts were not the reputed owners of the interest of the Colonial Bank in the shares." Lastly, the House of Lords held that shares are "things in action," within the meaning of the proviso in the reputed ownership clause of the Bankruptcy Act 1883.

Two cases have been before the Court in which questions arose as to the legal nature of certificates with blank transfers on the back. In both cases the certificates were issued by the New York Central Railroad Company to a registered shareholder. Each certificate is for ten shares, and on the back there is a blank form of transfer,

and a blank form of power of attorney to execute a surrender and cancellation of the certificate. The mode of transfer is as follows: The transfer and power of attorney are signed by the registered shareholder. When this blank transfer reaches the hand of some holder who desires to be registered, his name is filled in by himself or on his behalf, and the certificate is left with the company; it is then cancelled, the transferee is registered, and a new certificate in his name is issued.

In the first case, that of the *Colonial Bank* v. *Hepworth* (1887, 36 Ch. D., 36), Hepworth, the purchaser of the shares, left them in the hands of his broker. The broker deposited them with the Colonial Bank as security for an overdraft. The broker got them back from the bank under a promise to substitute the new certificates. These new certificates were made out not in the name of the bank, but in Hepworth's name. It was held by Chitty (J.) that the title of Hepworth was superior to that of the bank. The only estoppel that Chitty (J.) recognised as between holders, other than the transferor who had signed the blank transfer, was as follows: "Where the transfers are duly signed by the registered holders of the shares, each prior holder confers upon the *bonâ fide* holder for value of the certificates, for the time being, an authority to fill in the name of the transferee, and is estopped from denying such authority."

In the second case, which went to the House of Lords (*Colonial Bank* v. *Cady*, 1890, 15 A. C., 267), the facts were these: The registered owner of the shares died, and his executors obtained probate of the will. The executors, in order that the shares might be registered in their own names, signed as executors the transfers on the back of each certificate, without filling up the blanks, and sent the certificates to their broker, who

fraudulently deposited the certificates with the Colonial Bank, which took them *bonâ fide* and without notice as security for advances. The bank retained the certificates, and took no steps to obtain registration. By the law of New York, a delivery of signed transfers by the registered owner of shares would estop him from setting up his title against a purchaser for value, and Lord Herschell said that the English law was the same. But neither on the New York nor on the London Stock Exchange are transfers so signed by executors treated as being in order or received as sufficient security for advances unless duly authenticated. The executors brought an action against the bank to establish their title to the certificates, and it was held that they were so entitled, on the ground that the conduct of the executors in delivering the transfers was consistent either with an intention to sell or pledge the shares, or to have themselves registered as the owners, and therefore did not estop them from setting up their title as against the bank, for the bank ought to have inquired as to the broker's authority. Lord Herschell said: "In the case of a transfer signed by the registered owner, he must, presumably, have signed it with the intention at some time or other of effecting a transfer. No other reasonable construction can be put on his act. And if he entrusts it in that condition to a third party, I think those dealing with such third party have a right to assume that he has authority to complete a transfer. But when the indorsement is signed by executors who are the registered owners, there can be no such presumption. They may well have signed it merely to complete their title, without the intention of ever parting with the shares."

Realisation of Shares held as Security.—The mortgagee

of shares, where the mortgage is not by deed, has, in the absence of an express power of sale, an implied power to sell the shares on default by the mortgagor in payment of the amount due at the time appointed for payment; and if no time be fixed, then on the expiration of a reasonable notice by the mortgagee requiring payment on a day certain (*Deverges* v. *Sandeman, Clark & Co.*, 1902, 1 Ch., 579). In that case two of the Lords Justices expressed the opinion that a month's notice, or even less, would be a reasonable notice. Where the mortgage is by deed, there is a statutory power of sale under the provisions of sections 19 and 20 of the Conveyancing Act 1881. Either three months' notice to pay off the principal must have been given, and be uncomplied with, or interest must be in arrears for two months.

Where a certificate of shares is deposited as security for a debt without a transfer of the shares or any memorandum of deposit, the lender is entitled to ask the Court for a transfer of the shares and foreclosure, but not for a sale of the shares (*Harrold* v. *Plenty*, 1901, 2 Ch., 314). He can, of course, sell them when his transfer has been registered.

Debentures.—Debentures issued by a company which is a customer of a bank, as security for a debt of the company to the bank, have already been fully dealt with at page 139. But an ordinary customer of a bank may offer debentures as security. The legal position of the bank has been much simplified by the decisions given on pp. 230–1, as to bearer debentures. If the bank has taken bearer debentures for value and in good faith, then its position is unassailable. The other form of debentures commonly in use contain a promise to pay "the registered holder for the time being," without regard to equities which the company could set up against the original or

an intermediate holder.[1] If, therefore, the bank completes its title by becoming the registered holder, it is in the favoured position of a legal owner without notice, and has priority over equitable claims (see p. 295).

But there is always some risk until the bank becomes registered holder (see In re *Palmers Decoration & Furnishing Coy.*, 1904, 2 Ch., 743). In that case B was a registered holder of debentures against whom the company had equities. C was a transferee from B, who took without notice of the equities, but owing to the passing of a resolution for winding-up, C was unable to get the debentures registered in his own name. The debentures contained the usual provision as to payment without regard to equities. It was held that C was in no better position than B, and the company could enforce its equities against C.

[1] For a form, see Appendix C, p. 347.

APPENDIX (A)

BANK CHARTER ACT

7 & 8 Vict., cap. 32

An Act to regulate the issue of Bank Notes, and for giving to the Governor and Company of the Bank of England certain privileges for a limited period [19th July 1844]

Whereas it is expedient to regulate the issue of bills or notes payable on demand: And whereas an Act was passed in the fourth year of the reign of His late Majesty King William the Fourth, intituled "An Act for giving to the Corporation of the Governor and Company of the Bank of England certain privileges for a limited period, under certain conditions"; and it is expedient that the privileges of exclusive banking therein mentioned should be continued to the said governor and company of the Bank of England, with such alterations as are herein contained, upon certain conditions: May it therefore please your Majesty that it may be enacted; and be enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords, spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the thirty-first day of August One thousand eight hundred and forty-four the issue of promissory notes of the governor and company of the Bank of England, payable on demand, shall be separated and thenceforth kept wholly distinct from the general banking business of the said governor and company; and the business of and relating to such issue shall be henceforth conducted and carried on by the said governor and company in a separate department to be called "the issue department of the Bank of England," subject to the rules and regulations hereinafter contained; and it shall be lawful for the court of directors of the said governor and company, if they shall think fit, to appoint a committee or committees of directors for the conduct and management of such issue department of the Bank of England, and from time to time to

3 & 4 W. 4, c. 98.

Bank to establish a separate department for the issue of notes.

remove the members, and define, alter, and regulate the constitution and powers of such committee, as they shall think fit, subject to any bye-laws, rules, or regulations which may be made for that purpose; provided nevertheless, that the said issue department shall always be kept separate and distinct from the banking department of the said governor and company.

Management of the issue by Bank of England.

II. And be it enacted, that upon the thirty-first day of August One thousand eight hundred and forty-four there shall be transferred, appropriated, and set apart by the said governor and company to the issue department of the Bank of England securities to the value of fourteen million pounds, whereof the debt due by the public to the said governor and company shall be and be deemed a part; and there shall also at the same time be transferred, appropriated, and set apart by the said governor and company to the said issue department so much of the gold coin and gold and silver bullion then held by the Bank of England as shall not be required by the banking department thereof; and thereupon there shall be delivered out of the said issue department into the said banking department of the Bank of England such an amount of Bank of England notes as, together with the Bank of England notes then in circulation, shall be equal to the aggregate amount of securities, coin, and bullion so transferred to the said issue department of the Bank of England; and the whole amount of Bank of England notes then in circulation, including those delivered to the banking department of the Bank of England as aforesaid, shall be deemed to be issued on the credit of such securities, coin, and bullion so appropriated and set apart to the said issue department; and from thenceforth it shall not be lawful for the said governor and company to increase the amount of securities for the time being in the said issue department, save as hereinafter is mentioned, but it shall be lawful for the said governor and company to diminish the amount of such securities, and again to increase the same to any sum not exceeding in the whole the sum of fourteen million pounds, and so from time to time as they shall see occasion; and from and after such transfer and appropriation to the said issue department as aforesaid it shall not be lawful for the said governor and company to issue Bank of England notes, either into the banking department of the Bank of England, or to any persons or person whatsoever save in exchange for other Bank of England notes, or for gold coin or for gold or silver bullion received or purchased for the said issue department under the provisions of this Act, or in exchange for securities acquired and taken in the said issue department under the provisions herein contained:

provided always, that it shall be lawful for the said governor and company in their banking department to issue all such Bank of England notes as they shall at any time receive from the said issue department or otherwise, in the same manner in all respects as such issue would be lawful to any other person or persons.

Proportion of silver bullion to be retained in the issue department.

III. And whereas it is necessary to limit the amount of silver bullion on which it shall be lawful for the issue department of the Bank of England to issue Bank of England notes: be it therefore enacted, that it shall not be lawful for the Bank of England to retain in the issue department of the said bank at any one time an amount of silver bullion exceeding one-fourth part of the gold coin and bullion at such time held by the Bank of England in the issue department.

All persons may demand of the issue department notes for gold bullion.

IV. And be it enacted, that from and after the thirty-first day of August One thousand eight hundred and forty-four all persons shall be entitled to demand from the issue department of the Bank of England Bank of England notes in exchange for gold bullion, at the rate of three pounds seventeen shillings and ninepence per ounce of standard gold: provided always, that the said governor and company shall in all cases be entitled to require such gold bullion to be melted and assayed by persons approved by the said governor and company, at the expense of the parties tendering such gold bullion.

Power to increase securities in the issue department and issue additional notes.

V. Provided always, and be it enacted, that if any banker who on the sixth day of May One thousand eight hundred and forty-four was issuing his own bank notes shall cease to issue his own bank notes, it shall be lawful for Her Majesty in council, at any time after the cessation of such issue, upon the application of the said governor and company, to authorise and empower the said governor and company to increase the amount of securities in the said issue department beyond the total sum or value of fourteen million pounds, and thereupon to issue additional Bank of England notes to an amount not exceeding such increased amount of securities specified in such order in council, and so from time to time: provided always, that such increased amount of securities specified in such order in council shall in no case exceed the proportion of two-thirds the amount of bank notes which the banker so ceasing to issue may have been authorised to issue under the provisions of this Act; and every such order in council shall be published in the next succeeding *London Gazette*.

Account to

VI. And be it enacted, that an account of the amount of

be rendered by the Bank of England.

Bank of England notes issued by the issue department of the Bank of England, and of gold coin and of gold and silver bullion respectively, and of securities in the said issue department, and also an account of the capital stock, and the deposits, and of the money and securities belonging to the said governor and company in the banking department of the Bank of England, on some day in every week to be fixed by the commissioners of stamps and taxes, shall be transmitted by the said governor and company weekly to the said commissioners in the form prescribed in the schedule hereto annexed marked (A), and shall be published by the said commissioners in the next succeeding *London Gazette* in which the same may be conveniently inserted.

Bank of England exempted from stamp duty upon their notes.

VII. And be it enacted, that from and after the said thirty-first day of August One thousand eight hundred and forty-four the said governor and company of the Bank of England shall be released and discharged from the payment of any stamp duty, or composition in respect of stamp duty, upon or in respect of their promissory notes payable to bearer on demand; and all such notes shall thenceforth be and continued free and wholly exempt from all liability to any stamp duty whatsoever.

Bank to allow £180,000 per annum.

VIII. And be it enacted, that from and after the said thirty-first day of August One thousand eight hundred and forty-four the payment or deduction of the annual sum of one hundred and twenty thousand pounds, made by the said governor and company, under the provisions of the said Act passed in the fourth year of the reign of his late Majesty King William the Fourth, out of the sums payable to them for the charges of management of the public unredeemed debt, shall cease, and in lieu thereof the said governor and company, in consideration of the privileges of exclusive banking, and the exemption from stamp duties, given to them by this Act, shall, during the continuance of such privileges and such exemption respectively, but no longer, deduct and allow to the public, from the sums now payable by law to the said governor and company for the charges of management of the public unredeemed debt, the annual sum of one hundred and eighty thousand pounds, anything in any Act or Acts of Parliament, or in any agreement, to the contrary notwithstanding: provided always, that such deduction shall in no respect prejudice or affect the rights of the said governor and company to be paid for the management of the public debt at the rate and according to the terms provided in an Act passed in the forty-eighth year of the reign of

48 G. 3, c 4.

His late Majesty King George the Third, intituled, "An Act to authorise the advancing for the public service, upon certain conditions, a proportion of the balance remaining in the Bank

of England, for payment of unclaimed dividends, annuities, and lottery prizes, and for regulating the allowance to be made for the management of the national debt."

Bank to allow the public the profits of increased circulation.

IX. And be it enacted, that in case, under the provisions hereinbefore contained, the securities held by the said issue department of the Bank of England shall at any time be increased beyond the total amount of fourteen million pounds, then and in each and every year in which the same shall happen, and so long as such increase shall continue, the said governor and company shall, in addition to the said annual sum of one hundred and eighty thousand pounds, make a further payment or allowance to the public, equal in amount to the net profit derived in the said issue department during the current year from such additional securities, after deducting the amount of the expenses occasioned by the additional issue during the same period, which expenses shall include the amount of any and every composition or payment to be made by the said governor and company to any banker in consideration of the discontinuance at any time hereafter of the issue of bank notes by such banker; and such further payment or allowance to the public by the said governor and company shall, in every year while the public shall be entitled to receive the same, be deducted from the amount by law payable to the said governor and company for the charges and management of the unredeemed public debt, in the same manner as the said annual sum of one hundred and eighty thousand pounds is hereby directed to be deducted therefrom.

No new bank of issue.

X. And be it enacted, that from and after the passing of this Act no person other than a banker who on the sixth day of May One thousand eight hundred and forty-four was lawfully issuing his own bank notes shall make or issue bank notes in any part of the United kingdom.

Restriction against issue of bank notes.

XI. And be it enacted, that from and after the passing of this Act it shall not be lawful for any banker to draw, accept, make, or issue, in England or Wales, any bill of exchange or promissory note or engagement for the payment of money payable to bearer on demand, or to borrow, owe, or take up, in England or Wales, any sums or sum of money on the bills or notes of such banker payable to bearer on demand, save and except that it shall be lawful for any banker who was on the sixth day of May One thousand eight hundred and forty-four carrying on the business of a banker in England or Wales, and was then lawfully issuing, in England or Wales, his own bank notes, under the authority of a licence to that effect, to

continue to issue such notes to the extent and under the conditions hereinafter mentioned, but not further or otherwise; and the right of any company or partnership to continue to issue such notes shall not be in any manner prejudiced or affected by any change which may hereafter take place in the personal composition of such company or partnership, either by the transfer of any shares or share therein, or by the admission of any new partner or member thereto, or by the retirement of any present partner or member therefrom: provided always, that it shall not be lawful for any company or partnership now consisting of only six or less than six persons to issue bank notes at any time after the number of partners therein shall exceed six in the whole.

Bankers ceasing to issue notes may not resume.

XII. And be it enacted, that if any banker in any part of the United Kingdom who after the passing of this Act shall be entitled to issue bank notes shall become bankrupt, or shall cease to carry on the business of a banker, or shall discontinue the issue of bank notes, either by agreement with the governor and company of the Bank of England or otherwise, it shall not be lawful for such banker at any time thereafter to issue any such notes.

Existing banks of issue to continue under certain limitations.

XIII. And be it enacted, that every banker claiming under this Act to continue to issue bank notes in England or Wales shall, within one month next after the passing of this Act, give notice in writing to the commissioners of stamps and taxes at their head office in London of such claim, and of the place and name and firm at and under which such banker has issued such notes during the twelve weeks next preceding the twenty-seventh day of April last; and thereupon the said commissioners shall ascertain if such banker was on the sixth day of May One thousand eight hundred and forty-four carrying on the business of a banker, and lawfully issuing his own bank notes in England or Wales, and if it shall so appear then the said commissioners shall proceed to ascertain the average amount of the bank notes of such banker which were in circulation during the said period of twelve weeks preceding the twenty-seventh day of April last, according to the returns made by such banker in pursuance of the Act passed in the fourth and fifth years of the reign of Her present Majesty, intituled "An Act to make further provision relative to the returns to be made by banks of the amount of their notes in circulation"; and the said commissioners or any two of them shall certify under their hands to such banker the said average amount, when so ascertained as aforesaid; and it shall be lawful for every such banker to continue to issue his own

4 & 5 Vict. c. 50.

bank notes after the passing of this Act: provided nevertheless, that such banker shall not at any time after the tenth day of October One thousand eight hundred and forty-four have in circulation upon the average of a period of four weeks, to be ascertained as hereinafter mentioned, a greater amount of notes than the amount so certified.

In case banks become united, commissioners to certify the amount of bank notes which each bank was authorised to issue.

XVI. And be it enacted, that in case it shall be made to appear to the commissioners of stamps and taxes, at any time hereafter, that any two or more banks, each such bank consisting of not more than six persons, have, by written contract or agreement (which contract or agreement shall be produced to the said commissioners), become united subsequently to the passing of this Act, it shall be lawful to the said commissioners, upon the application of such united bank, to certify, in manner hereinbefore mentioned, the aggregate of the amounts of bank notes which such separate banks were previously authorised to issue, and so from time to time; and every such certificate shall be published in manner hereinbefore directed; and from and after such publication the amount therein stated shall be and be deemed to be the limit of the amount of bank notes which such united bank may have in circulation: provided always, that it shall not be lawful for any such united bank to issue bank notes at any time after the number of partners therein shall exceed six in the whole.

Penalty on banks issuing in excess.

XVII. And be it enacted, that if the monthly average circulation of bank notes of any banker, taken in the manner hereinafter directed, shall at any time exceed the amount which such banker is authorised to issue and to have in circulation under the provisions of this Act, such banker shall in every such case forfeit a sum equal to the amount by which the average monthly circulation, taken as aforesaid, shall have exceeded the amount which such banker was authorised to issue and to have in circulation as aforesaid.

Issuing banks to render accounts.

XVIII. And be it enacted, that every banker in England and Wales, who, after the tenth day of October One thousand eight hundred and forty-four, shall issue bank notes, shall, on one day in every week after the nineteenth day of October One thousand eight hundred and forty-four (such day to be fixed by the commissioners of stamps and taxes), transmit to the said commissioners an account of the amount of the bank notes of such banker in circulation on every day during the week ending on the next preceding Saturday, and also an account of the average amount of the bank notes of such banker in circulation during the same week; and on completing the

first period of four weeks, and so on completing each successive period of four weeks, every such banker shall annex to such account the average amount of bank notes of such banker in circulation during the said four weeks, and also the amount of bank notes which such banker is authorised to issue under the provisions of this Act; and every such account shall be verified by the signature of such banker or his chief cashier, or, in the case of a company or partnership, by the signature of a managing director or partner or chief cashier of such company or partnership, and shall be made in the form to this Act annexed marked (B); and so much of the said return as states the weekly average amount of the notes of such bank shall be published by the said commissioners in the next succeeding *London Gazette* in which the same may be conveniently inserted, and if any such banker shall neglect or refuse to render any such account in the form and at the time required by this Act, or shall at any time render a false account, such banker shall forfeit the sum of one hundred pounds for every such offence.

Mode of ascertaining the average amount of bank notes of each banker in circulation during the first four weeks after 10th October 1844.

XIX. And be it enacted, that for the purpose of ascertaining the monthly average amount of bank notes of each banker in circulation the aggregate of the amount of bank notes of each such banker in circulation on every day of business during the first complete period of four weeks next after the tenth day of October One thousand eight hundred and forty-four, such period ending on a Saturday, shall be divided by the number of days of business in such four weeks, and the average so ascertained shall be deemed to be the average of bank notes of each such banker in circulation during such period of four weeks, and so in each successive period of four weeks, and such average is not to exceed the amount certified by the commissioners of stamps and taxes as aforesaid.

Commissioners of stamps and taxes empowered to cause the books of bankers containing accounts of their bank notes in circulation to be inspected.

XX. And whereas, in order to insure the rendering of true and faithful accounts of the amount of bank notes in circulation as directed by this Act, it is necessary that the commissioners of stamps and taxes should be empowered to cause the books of bankers issuing such notes to be inspected, as hereinafter mentioned: be it thereafter enacted, that all and every the book and books of any banker who shall issue bank notes under the provisions of this Act in which shall be kept, contained, or entered any account, minute, or memorandum of or relating to the bank notes issued or to be issued by such banker, or of or relating to the amount of such notes in circulation, from time to time, or any account, minute, or memorandum, the sight or inspection whereof may tend to

secure the rendering of true accounts of the average amount of such notes in circulation, as directed by this Act, or to test the truth of any such account, shall be open for the inspection and examination, at all seasonable times, of any officer of stamp duties authorised in that behalf by writing, signed by the commissioners of stamps and taxes or any two of them; and every such officer shall be at liberty to take copies of or extracts from any such book or account as aforesaid; and if any banker or other person keeping any such book, or having the custody or possession thereof, or power to produce the same, shall, upon demand made by any such officer, showing (if required) his authority in that behalf, refuse to produce any such book to such officer for his inspection and examination, or to permit him to inspect and examine the same, or to take copies thereof or extracts therefrom, or of or from any such account, minute, or memorandum as aforesaid kept, contained, or entered therein, every such banker or other person so offending shall for every such offence forfeit the sum of one hundred pounds: provided always, that the said commissioners shall not exercise the powers aforesaid without the consent of the commissioners of Her Majesty's Treasury.

Penalty for refusing to allow such inspection.

XXI. And be it enacted, that every banker in England and Wales who is now carrying on or shall hereafter carry on business as such shall on the first day of January in each year, or within fifteen days thereafter, make a return to the commissioners of stamps and taxes at their head office in London of his name, residence, and occupation, or in the case of a company or partnership, of the name, residence, and occupation of every person composing or being a member of such company or partnership, and also the name of the firm under which such banker, company, or partnership carry on the business of banking, and of every place where such business is carried on; and if any such banker, company, or partnership shall omit or refuse to make such return within fifteen days after the said first day of January, or shall wilfully make other than a true return of the persons as herein required, every banker, company, or partnership so offending shall forfeit and pay the sum of fifty pounds; and the said commissioners of stamps and taxes shall on or before the first day of March in every year publish in some newspaper circulating within each town or county respectively a copy of the return so made by every banker, company, or partnership carrying on the business of bankers within such town or county respectively as the case may be.

All bankers to return names once a year to the Stamp Office.

XXII. And be it enacted, that every banker who shall be

Bankers to

take out a separate licence for every place at which they issue notes or bills.

liable by law to take out a licence from the commissioners of stamps and taxes to authorise the issuing of notes or bills shall take out a separate and distinct licence for every town or place at which he shall, by himself or his agent, issue any notes or bills requiring such licence to authorise the issuing thereof, anything in any former Act contained to the contrary thereof notwithstanding: provided always, that no banker who on or before the sixth day of May One thousand eight hundred and forty-four, had taken out four such licences, which on the said last-mentioned day were respectively in force, for the issuing of any such notes or bills at more than four separate towns or places, shall at any time hereafter be required to take out or to have in force at one and the same time more than four such licences to authorise the issuing of such notes or bills at all or any of the same towns or places specified in such licences in force on the said sixth day of May One thousand eight hundred and forty-four, and at which towns or places respectively such bankers had on or before the said last-mentioned day issued such notes or bills in pursuance of such licences or any of them respectively.

Proviso in favour of bankers who had four such licences in force on the 6th of May 1844.

Banks within sixty-five miles of London may accept, etc., bills.

XXVI. And be it enacted, that from and after the passing of this Act it shall be lawful for any society or company or any persons in partnership, though exceeding six in number, carrying on the business of banking in London, or within sixty-five miles thereof, to draw, accept, or endorse bills of exchange, not being payable to bearer on demand, anything in the hereinbefore recited Act passed in the fourth year of the reign of his said Majesty King William the Fourth, or in any other Act, to the contrary notwithstanding.

Bank to enjoy privileges, subject to redemption.

XXVII. And be it enacted, that the said governor and company of the Bank of England shall have and enjoy such exclusive privilege of banking as is given by this Act, upon such terms and conditions, and subject to the termination thereof at such time and in such manner, as is by this Act provided and specified; and all and every the powers and authorities, franchises, privileges, and advantages, given or recognised by the said recited Act passed in the fourth year of the reign of his Majesty King William the Fourth as belonging to or enjoyed by the said governor and company of the Bank of England, or by any subsequent Act or Acts of Parliament, shall be, and the same are hereby declared to be, in full force and continued by this Act, except so far as the same are altered by this Act; subject, nevertheless, to redemption upon the terms and conditions following; (that is to say), at any time upon twelve months' notice to be given after the first

day of August One thousand eight hundred and fifty-five, and upon repayment by Parliament to the said governor and company or their successors of the sum of eleven million fifteen thousand and one hundred pounds, being the debt now due from the public to the said governor and company, without any deduction, discount, or abatement whatsoever, and upon payment to the said governor and company and their successors of all arrears of the sum of one hundred thousand pounds per annum, in the last-mentioned Act mentioned, together with the interest or annuities payable upon the said debt or in respect thereof, and also upon repayment of all the principal and interest which shall be owing unto the said governor and company and their successors upon all such tallies, Exchequer orders, Exchequer bills, or Parliamentary funds which the said governor and company or their successors shall have remaining in their hands or to be entitled to at the time of such notice to be given as last aforesaid, then and in such case, and not till then, the said exclusive privileges of banking granted by this Act shall cease and determine at the expiration of such notice of twelve months; and any vote or resolution of the House of Commons, signified under the hand of the Speaker of the said House in writing, and delivered at the public office of the said governor and company, shall be deemed and adjudged to be a sufficient notice.

Interpretation clause.

XXVIII. And be it enacted, that the term "Bank Notes" used in this Act shall extend and apply to all bills or notes for the payment of money to the bearer on demand other than bills or notes to the governor and company of the Bank of England; and that the term "Bank of England Notes" shall extend and apply to the promissory notes of the governor and company of the Bank of England payable to bearer on demand; and that the term "Banker" shall extend and apply to all corporations, societies, partnerships, and persons, and every individual person carrying on the business of banking, whether by the issue of bank notes or otherwise, except only the governor and company of the Bank of England; and that the word "Person" used in this Act shall include corporations; and that the singular number in this Act shall include the plural number, and the plural number the singular, except where there is anything in the context repugnant to such construction; and that the masculine gender in this Act shall include the feminine, except where there is anything in the context repugnant to such construction.

Act may be amended.

XXIX. And be it enacted, that this Act may be amended or repealed by any Act to be passed in the present session of Parliament.

SCHEDULE (B)

Name and title as set forth in the licence . . . . _____ Bank.

Name of the firm . . . . _____ Firm.

Insert head office or principal place of issue . . . _____ Place.

AN ACCOUNT pursuant to the Act 7 and 8 Vict., cap. of the notes of the said bank in circulation during the week ending Saturday the day of 18 .

Monday	
Tuesday	
Wednesday	
Thursday	
Friday	
Saturday	
	(6)
Average of the week	.

[*To be annexed to this Account at the end of each period of four weeks*]

Amount of notes authorised by law .	£
Average amount in circulation during the four weeks ending as above .	£

I, being [the banker, chief cashier, managing director, *or* partner of the bank, *as the case may be*], do hereby certify, that the above is a true account of the notes of the said bank in circulation during the week above written.

(Signed)

Dated the day of 18

APPENDIX (B)

STAMP DUTIES

General principles.—An instrument must be stamped for its leading and principal object, and unless so stamped it cannot be given in evidence for any subordinate object.

If an instrument is duly stamped for its leading object, the stamp covers everything accessory to that object.

An instrument exempt from duty as to its leading object is not rendered liable to duty by anything accessory to that object (Alpe. Introduction).

Classification of stamps.—Stamps admit of a double classification. First, some stamps are adhesive, and others are impressed. Again, some stamps are appropriated to a particular class of documents, and others are not so. But "appropriated" stamps may be either adhesive or impressed.

Adhesive stamps (unappropriated).—Any stamp duties of an amount not exceeding two shillings and sixpence upon instruments which are permitted by law to be denoted by adhesive stamps, not appropriated by any word or words on the face of them to any particular description of instrument, and any postage duties of the like amount, may be denoted by the same adhesive stamps.

The following documents may be stamped with adhesive stamps—

Agreements under hand liable to the fixed duty of sixpence.
Cheques, and bills of exchange payable on demand.
Contract notes liable to the duty of one penny.
Delivery orders.
Notarial acts.
Policies of insurance, not life or sea.
Protests of bills of exchange or promissory notes.
Receipts.
Warrants for goods.

An instrument is not to be deemed duly stamped with an adhesive stamp unless the stamp is cancelled by the proper person. He should write on or across the stamp his name or initials, or the name or initials of his firm, together with the

true date of his so writing. The stamp should be affixed before signature and delivery. In general, the person executing the instrument is the proper person to cancel the stamp.

Appropriated stamps.—A stamp which by any word or words on the face of it is appropriated to any particular description of instrument is not to be used, or if used, is not to be available for an instrument of any other description. An instrument falling under the particular description to which any stamp is so appropriated as aforesaid is not to be deemed duly stamped unless it is stamped with the stamp so appropriated.

The appropriated stamps are—

Impressed.—Bill or note.—For bills of exchange (payable other wise than on demand, or at sight, or on presentation) and promissory notes purporting to be drawn or made in the United Kingdom.

Adhesive.—Bill or note.—For bills of exchange (payable otherwise than on demand, or at sight, or on presentation) and promissory notes purporting to be drawn or made out of the United Kingdom.

Contract note.—One shilling duty.

Impressed stamps.—The only documents for which impressed stamps must not be used are those for which there are adhesive stamps appropriated (see last paragraph). For all other documents, impressed stamps are either optional (see paragraph on adhesive stamps unappropriated) or compulsory.

Penalties, etc.—For neglecting to cancel an adhesive stamp there is a fine of £10. A similar fine is imposed on anyone who issues, indorses, transfers, negotiates, presents for payment, or pays any bill of exchange which is not duly stamped. Such a bill cannot be recovered on, and is not available for any purpose whatever. But in the case of an unstamped cheque, the paying banker may affix a penny stamp, and deduct the penny from the amount payable. In general the penalty for stamping an unstamped or insufficiently stamped document after execution (subject to certain exceptions) is £10. One important exception is that of agreements under hand liable to the fixed duty of sixpence. These may be stamped without penalty within fourteen days from the date of execution. Deeds may in general be stamped without penalty within thirty days from the date of execution.

Amounts of stamp duties—	*s.*	*d.*
AGREEMENT or any memorandum of an agreement not otherwise specifically charged with any duty	0	6

	s.	d.
The following exemptions may be noted—		
(1) Agreement, the matter whereof is not of the value of £5.		
(2) Agreement for the hire of any labourer, artificer, manufacturer, or menial servant.		
(3) Agreement, letter, or memorandum made for or relating to the sale of any goods, wares, or merchandise.		
BILL OF EXCHANGE payable on demand, or at sight, or on presentation, or within three days after date or sight	0	1
BILL OF EXCHANGE of any other kind (except a bank note) and promissory note of any kind (except a bank note) drawn or expressed to be payable in the United Kingdom—		
Where the amount or value of the money for which the bill or note is drawn or made does not exceed £5	0	1
Exceeds £5 and does not exceed £10 . .	0	2
„ £10 „ „ £25 . .	0	3
„ £25 „ „ £50 . .	0	6
„ £50 „ „ £75 . .	0	9
„ £75 „ „ £100. .	1	0
„ £100, for every £100, and also for any fractional part of £100 of such amount or value	1	0
BILL OF EXCHANGE drawn and expressed to be payable out of the United Kingdom when actually paid or indorsed, or in any manner negotiated in the United Kingdom—		
Where the amount of the money for which the bill is drawn does not exceed £50 .	as above	
Exceeds £50 and does not exceed £100 .	0	6
Exceeds £100, for every £100, and also for any fractional part of £100 of that amount	0	6

The term Bill of Exchange includes draft, order, cheque, and letter of credit, and any document or writing (except a bank note) entitling, or purporting to entitle, any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money.

The following exemptions may be noted—

(1) Bill or note issued by the Bank of England or the Bank of Ireland.

(2) Draft or order drawn by any banker in the United Kingdom upon any other banker in the United Kingdom, not payable to bearer or to order, and used solely for the purpose of settling or clearing any account between such bankers.

(3) Letter written by a banker in the United Kingdom to any other banker in the United Kingdom, directing the payment of any sum of money, the same not being payable to bearer or order, and such letter not being sent or delivered to the person to whom payment has to be made, or to any person on his behalf.

(4) Letter of credit granted in the United Kingdom, authorising drafts to be drawn out of the United Kingdom payable in the United Kingdom.

(5) Coupon or warrant for interest on a marketable security, being one of a set of coupons, whether issued with the security or subsequently issued in a sheet.

(6) Various drafts, warrants, orders, and bills drawn by Government officials in the course of their duties.

	s.	*d.*
BILL OF LADING of or for any goods, merchandise, or effects to be *exported* or carried coastwise. A bill of lading is not to be stamped after execution. A bill of lading for goods *imported* into the United Kingdom is not liable to stamp duty.	0	6
CHEQUE, see BILL OF EXCHANGE.		
CONTRACT NOTE, for or relating to the sale or purchase of any stock or marketable security, Of the value of £5 and under the value of £100	0	1
Of the value of £100 or upwards . .	1	0
DEED of any kind not subject to a special stamp duty	10	0
DELIVERY ORDER	*nil.*	
LETTER OF ALLOTMENT (under £5) and SCRIP CERTIFICATE	0	1
LETTER OF ALLOTMENT (£5 and over) . .	0	6
LETTER OF CREDIT, see BILL OF EXCHANGE (definition and exemptions).		

	s.	d.
LETTER OR POWER OF ATTORNEY—		
(1) For use as a proxy	0	1
(2) For the receipt of the Dividends or interest of any stock where made for the receipt of one payment only . .	1	0
In any other case . . .	5	0
(3) For the receipt of any sum of money, or any bill of exchange or promissory note, for any sum of money not exceeding £20, or any periodical payments not exceeding the annual sum of £10 .	5	0
(4) For the sale, transfer, or acceptance of any of the government or parliamentary stocks or funds, where the nominal value of the stocks or funds does not exceed £100	2	6
(5) Of any other kind not subject to a special duty	10	0

The following exemption may be noted—

Order, request, or direction, under hand only, from the proprietor of any stock to any company, or to any officer of any company, or to any banker, to pay the dividends or interest arising from the stock, to any person therein named.

MARKETABLE SECURITY: marketable security (*a*) being a colonial government security, or (*b*) being a security not transferable by delivery, or (*c*) being a security transferable by delivery, and bearing date or signed or offered for subscription before or on the 6th day of August 1885.

For or in respect of the money thereby secured . . . . . The same *ad valorem* duty as upon a mortgage.

Marketable security (except a colonial government security), being a security transferable by delivery, and bearing date or signed or offered for subscription after 6th August 1885.

For every £10, and also for any fractional part of £10, of the money thereby secured . . 1 0

MORTGAGE, BOND, DEBENTURE, COVENANT, (except a marketable security otherwise specially charged with duty).

(1) Being the only or principal or primary secur-

	s.	d.
ity (other than an equitable mortgage) for the payment or repayment of money :—		
not exceeding £10	0	3
Exceeding £10 and „ „ £25	0	8
„ £25 „ „ „ £50	1	3
„ £50 „ „ „ £100	2	6
„ £100 „ „ „ £150	3	9
„ £150 „ „ „ £200	5	0
„ £200 „ „ „ £250	6	3
„ £250 „ „ „ £300	7	6
Exceeding £200, for every £100, and also for any fractional part of £100, of the amount secured . . .	2	6

(2) Being a collateral, or auxiliary, or additional, or substituted security (other than an equitable mortgage), or by way of further assurance for the above-mentioned purpose, where the principal or primary security is duly stamped.
For every £100, and also for any fractional part of £100, of the amount secured 0 6

(3) Being an EQUITABLE MORTGAGE.
For every £100, and any fractional part of £100, of the amount secured . 1 0

(4) TRANSFER of any mortgage, bond, etc.
For every £100, and also for any fractional part of £100, of the amount transferred, exclusive of interest which is not in arrear . . . 0 6
And also where any further money is added to the money already secured. The same duty as a principal security for such further money.

(5) RECONVEYANCE, etc. of any such security.
For every £100, and also for any fractional part of £100, of the total amount or value of the money at any time secured 0 6

"EQUITABLE MORTGAGE" means an agreement or memorandum under hand only, relating to the deposit of any title-deeds or instruments constituting or being evidence of the title to any property whatever (other than stock or marketable security), or creating a charge on such property.

"MORTGAGE TO SECURE A CURRENT ACCOUNT." A security

for the payment or repayment of money to be lent, advanced, or paid, or which may become due upon an account current, either with or without money previously due, is to be charged where the total amount secured or to be ultimately recoverable is in any way limited, with the same duty as a security for the amount so limited.

Where such total amount is unlimited, the security is to be available for such an amount only as the *ad valorem* duty impressed thereon extends to cover, but where any advance or loan is made in excess of the amount covered by that duty, the security shall, for the purpose of stamp duty, be deemed to be a new and separate instrument, bearing date on the day on which the advance or loan is made.

	s.	*d.*
NOTARIAL ACT of any kind, except a protest of a bill of exchange or promissory note . .	1	0
POLICY OF SEA INSURANCE,		
(1) Where the premium or consideration does not exceed the rate of 2s. 6d. per centum of the sum insured . . .	0	1
(2) In any other case, (*a*) for or upon any voyage in respect of every full sum of £100, and also any fractional part of £100, thereby insured	0	3
(*b*) for time :—		
In respect of every full sum of £100, and also any fractional part of £100, thereby insured—		
Where the insurance shall be made for any time not exceeding six months	0	3
Where the insurance shall be made for any time exceeding six months and not exceeding twelve months .	0	6
POLICY OF LIFE INSURANCE.		
Where the sum insured does not exceed £10	0	1
Exceeds £10 but does not exceed £25, .	0	3
Exceeds £25 „ „ „ „ £500, For every full sum of £50, and also for any fractional part of £50, of the amount insured	0	6
Exceeds £500 but does not exceed £1000, For every full sum of £100, and also for any fractional part of £100, of the amount insured . . .	1	0
Exceeds £1000, For every full sum of £1000, and also		

	s.	d.
for any fractional part of £1000, of the amount insured . . .	10	0
POLICY OF INSURANCE (other than above) . .	0	1
PROTEST of any bill of exchange or promissory note, where the duty on the bill or note does not exceed 1s.	The same duty as the bill or note.	
In any other case	1	0
RECEIPT given for or upon the payment of money amounting to £2 or upwards . . .	0	1

The following exemptions may be noted :—

(1) Receipt given for money deposited in any bank or with any banker to be accounted for, and expressed to be received of the person to whom the same is to be accounted for.

(2) Acknowledgment by any banker of the receipt of any bill of exchange or promissory note for the purpose of being presented for acceptance or payment.

(3) Receipt given upon any bill or note of the Bank of England or the Bank of Ireland.

(4) Various receipts by government officers.

SHARE WARRANT OR STOCK CERTIFICATE TO BEARER issued under the Provisions of the Companies Act 1867 . . . . . A duty of an amount equal to three times the amount of the *ad valorem* stamp duty which would be chargeable on a deed transferring the share or shares or stock specified in the warrant or certificate if the consideration for the transfer were the nominal value of such share or shares or stock.

WARRANT FOR GOODS 0 3

A 'warrant for goods' means any document, being evidence of the title of any person therein named, or his assigns, or the holder thereof, to the property in any goods, wares, or merchandise lying in any warehouse or dock, or upon any wharf, and signed or certified by or on behalf of the person having the custody of the goods, wares, or merchandise.

The following exemptions may be noted :—

(1) Any document or writing given by an inland carrier acknowledging the receipt of goods conveyed by such carrier.

(2) A weight note issued together with a duly stamped warrant, and relating solely to the same goods, wares, or merchandise.

APPENDIX (C)

(*a*) FORMS RELATING TO CHEQUES, BILLS OF EXCHANGE, ETC.

FORMS OF CROSSINGS

1

2

& Co.

3

& Co.

Not negotiable

4

Not negotiable

5

Lloyd's Bank, Birmingham

6

Lloyd's Bank, Birmingham

7

Lloyd's Bank, Birmingham

Not negotiable

8

Lloyd's Bank, Birmingham

Not negotiable

Phrases like

a/c payee

a/c Smith & Co.

Under —— pounds

may be added to either form, but they are not crossings recognised by the Bills of Exchange Act.

1, 2, 3, 4 are general crossings; 5, 6, 7, 8 are special crossings.

SPECIMEN BILLS OF EXCHANGE.

(Inland) Birmingham, 25th July 1906.

£200.

Stamp 2s.

Three months after date pay to Henry Smith or order the sum of Two hundred pounds.

Wm. Jones.

To R. Hill, Esq.,
17 King Street, London.

(Foreign) Bristol, 25th July 1906.

Exchange for £150.

Stamp 2s.

Sixty days after sight pay this, our first of exchange (second and third of the same tenor and date unpaid), to the order of Henry Smith, the sum of One hundred and fifty pounds, value received, which place to account as advised.

Wm. Jones.

To Messrs Hill & Co.,
New York.

(Inland) Birmingham, 25th July 1906.

£50.

Stamp 1d.

On demand pay to the order of Henry Smith Fifty pounds sterling.

Wm. Jones.

To Messrs Hill & Co.,
London.

(Foreign) Chicago, 25th July 1906.

Exchange for £250.

In case of need apply to Mr F. Green, Christiania.

Stamp 3s.

At ninety days' sight of this first of exchange (second unpaid), pay to the order of Henry Smith Two hundred and fifty pounds.

Value received, and charge the same to the account of Swift & Co.

J. H. Swift.

To Dresdner Bank,
London, England.

(Foreign) Birmingham, 25th July 1906.

£205.

Stamp 3s.

Ninety days after sight pay this first of exchange (second unpaid) to the order of ourselves, the sum of Two hundred and five pounds. Exchange as per indorsement, value received, which place to account as per advice.

Brown, Smith & Co.

To Messrs Hill & Co.,
Rio de Janeiro.

(Foreign) Birmingham, 25th July 1906.

£250.

Stamp 3s.

Ninety days after sight pay this first of exchange (second unpaid) to the order of the London & Brazilian Bank, Limited, the sum of Two hundred and fifty pounds, payable at the Bank's drawing rate on day of maturity for sight bills on London, value received, which place to account as per advice.

Brown, Smith & Co.

To Messrs Hill & Co.,
Rio de Janeiro.

(Foreign) Bristol, 25th July 1906.

Exchange for $600.

Stamp 2s.

Ninety days after sight of this our second of exchange (first and third of the same tenor and date unpaid), pay to the order of Henry Brown, Six hundred dollars, value received, which place to account as advised. Shipping documents attached to be surrendered on payment.

Wm. Hill.

To Messrs Smith & Co.,
Shanghai.

(Foreign) London, 25th July 1906.

£500.

Stamp 5s.

Ninety days after sight pay this third of exchange (first and second unpaid), to our order, the sum of Five hundred pounds sterling, payable at the National Bank of India's drawing rate for demand drafts on London, with interest at 5 per cent. per annum added thereto from date hereof to approximate due date of the remittance in London, value received. Documents to be surrendered against acceptance.

Wm. Hill & Co.

To Messrs Smith & Co.,
Bombay.
In need with Messrs Williams & Co.
for the honour of Wm. Hill & Co.

FORMS OF ACCEPTANCE.

General Acceptances.

1. Accepted. WILLIAM JONES.
2. Accepted. WM. JONES, 16 Cheapside, E.C.
3. Accepted, payable at Parr's Bank. WM. JONES.
4. Accepted. *Per pro* WM. JONES, J. ROBERTS.
5. Accepted for the Paper Co. Ltd., and by its authority.
   ROBERT GREEN, HENRY HOLLAND } *Directors.*
6. Sighted, July 25th. Accepted, July 26th.
   WM. JONES.
7. Accepted, July 26th, 1906. Payable at Lloyd's Bank.
   WM. JONES.

Acceptances for Honour.

1. Accepted supra protest. WM. JONES.
2. Accepted S. P. WM. JONES.
3. Accepted S. P. for the honour of J. Smith.
   WM. JONES.

Qualified Acceptances.

1. Accepted payable at Parr's Bank and there only.
   WM. JONES.
2. Accepted for £20 only. WM. JONES.
3. Accepted payable at six months. WM. JONES.
4. Accepted payable when in funds. WM. JONES.
5. Accepted payable on delivery of bills of lading.
   WM. JONES.
6. Accepted on condition that it be renewed for six months.
   WM. JONES.
7. Accepted payable 1st June 1906. WM. JONES.
8. Accepted payable by monthly instalments of £5 each.
   WM. JONES.

NOTICE OF DISHONOUR.

(Form given, p. 36 Moxon's *Practical Banking*.)

Bank, Stratford, 17th Feb. 1885.

To _____ of _____

Please take notice that C. D.'s draft upon E. F. of F., dated 12th November 1884, at three months' date, due 15th February 1885, payable at Jones, Lloyd & Co., upon which you are liable as (drawer, indorser, *or* acceptor), has been returned to us dishonoured by non-acceptance (*or* non-payment), and we request immediate payment thereof by you with expenses £_____. Total £_____.

G. H. & Co.

(Another form.)

_____ Bank,

_____ Branch, _____ 190

I hereby give you notice that the bill of which I append particulars, bearing your indorsement, has been duly presented for payment, and dishonoured, and that the same lies unpaid at this Bank, with charges ( ).

Requesting you to give the matter your immediate attention,—I am, Dear Sir, Your obedient servant,

Manager.

Date.	Drawer.	Acceptor.	Amount.	Due Date.

(Another form.)

21st March 1906.

We beg to inform you that a bill for £100, drawn by B. C. on C. D., due on the 20th inst., bearing your indorsement, and discounted by us on the 17th December 1905, has been duly presented for payment, and returned unpaid with the answer "No orders." Kindly reimburse us the amount of the bill, together with the expenses of noting, 1s. 6d.—We are, Dear Sir, Yours faithfully,

B. & Co.

PROTESTS.[1]

PROTEST of a BILL on non-acceptance for various reasons.

On the day of I, R. B., Public Notary, etc., at the request of C. D. of [*or* of "the holder" *or* "the bearer," *as the case may be*], did exhibit the original bill of exchange, whereof a true copy is on the other side written [*or* did cause due and customary presentment to be made of the original bill of exchange, whereof a true copy is on the other side written],

(*A*) unto a clerk in the counting-house of E. F., the person upon whom the same is drawn, and demanded acceptance thereof, and he answered that it would not be accepted at present.

(*B*) unto a clerk in the counting-house of E. F., the person upon whom the same is drawn, and demanded acceptance thereof, and he answered that the said E. F. was not within, and had left no orders for the acceptance of the said bill.

(*C*) at the counting-house of E. F., the person upon whom the said bill is drawn, in order to present the same, and to demand acceptance of it, and the door was found fastened, and there was no person there to give an answer [and I am informed that the said E. F. has been declared bankrupt, or has suspended payment].

Whereof I, the said notary, at the request aforesaid, did, and do by these presents, protest against the drawer of the said bill, and all other parties thereto, and all others concerned, for all costs, exchange, re-exchange, and all costs, damages, and interest, present and to come, for want of acceptance of the said bill. Thus protested in the presence of B. B. and F. F., witnesses. A. B., Notary Public.

Seal.

Which I attest.

R. B., Notary Public L.

These forms are taken (with one exception) from Brooke's *Notary*.

PROTEST of a BILL on non-acceptance when the drawee cannot be found.

On the day of I, R. B., Public Notary, etc. etc., did make and cause to be made due and careful inquiries at the Liverpool Post Office, and in other proper quarters, for E. F., the person upon whom the said bill purports to be drawn, in order to have demanded acceptance thereof, but was unable to discover him, or to learn any tidings of him or his residence. Whereof, etc. etc.

PROTEST of a BILL on non-acceptance when a copy has been exhibited in the absence of the original.

On the day of I, R. B., Public Notary, etc. etc., did apply for the original bill of exchange, whereof on the other side a copy, or the principal contents, is or are written, unto a clerk in the counting-house of Mr D. K., the person upon whom the same is drawn, and demanded acceptance of the said original bill, and I also demanded the delivery of the said original bill, but he did not deliver up the same, and stated that Mr K. had left the counting-house, and had (as he believed inadvertently) taken the said bill away with him, and that the same was not accepted. Whereof, etc. etc.

PROTEST of a BILL for non-payment.

These forms follow those for non-acceptance, with the substitution of the word "payment" for the word "acceptance."

PROTEST of a BILL for better security.

On the day of I, R. B., Notary Public, etc. etc., did exhibit the original bill of exchange (whereof a true copy is on the other side written) at the counting-house of E. F., the person upon whom the said bill is drawn, and whose acceptance appears thereon, and did present the same unto a clerk there, and demanded security for the payment thereof when the same should become payable, in consequence of the said E. F. having become bankrupt [*or*

having suspended payment], and I received for answer that security for the same could not be given by the said E. F., who has been declared bankrupt [*or* has suspended payment]. Wherefore I, the said notary, at the request aforesaid, have protested, and by these presents do protest, against the drawee of the said bill, and the acceptor and all other parties thereto, and all others concerned, for all exchange, re-exchange, and all costs, damages, and interest, present and to come, for want of better security, for the payment of the said bill when due.

ACT of HONOUR on acceptance supra protest.

On the day of I, R. B., Notary Public, etc., do hereby certify that the original bill of exchange for £500, of which a copy is on the other side written (now protested for non-acceptance), was this day exhibited unto E. F., one of the firm of E. F. & Co., who declared that the said firm would accept the said bill *supra protest* for the honour of the drawer [*or of* G. H., *the indorser*]; holding the drawer [*or the said indorser and the drawer*] and all other proper persons responsible to the said firm for the said sum, and for all interest, damages, and expenses incident thereto; I have therefore granted this notarial act of honour accordingly. Which I attest, etc.

PROTEST of BILL of EXCHANGE by Householder.

Know all men that I, householder of in the County of , in the United Kingdom, at the request of there being no Notary Public available, did on the day of 19 , at demand payment (*or* acceptance) of the bill of exchange hereunder written from to which demand he made answer (*state answer if any*), wherefore I now in the presence of and do protest the said bill of exchange.

(Signed)

Witnesses :—

A copy of the Bill with its indorsations is annexed hereto.

SPECIMEN PROMISSORY NOTES.

Stamp 1s.

London, 25th July 1906.

£80.

On demand I promise to pay to Robert Jones or order Eighty pounds.

THOMAS HILLS.

Stamp 2s.

London, 25th July 1906.

£150.

Sixty days after date we promise to pay to Robert Jones or order One hundred and fifty pounds sterling.

THOMAS HILLS.
WM. WATSON.

Stamp 1s.

London, 25th July 1906.

£90.

Three months after date I promise to pay at Lloyd's Bank, Birmingham, to Robert Jones, Ninety pounds.

THOMAS HILLS.

London, 25th July 1906.

£120.

Six months after date the Brown Paper Co. Limited promises to pay the Wood Pulp Co. Limited One hundred and twenty pounds, value received.

For the Brown Paper Co. Limited, and by its authority,

J. BROWN } *Directors.*
C. BLACK }

Stamp 8s.

Birmingham, 25th July 1906.

£750.

On demand we jointly and severally promise to pay to Messrs Smart & Co. the sum of Seven hundred and fifty pounds, with interest at the rate of 4 per cent. from the date hereof until payment in full.

W. JAMES.
S. BERRY.

T1-u.—Div. 73.

DIVIDEND WARRANT.

5th July 1906.

£2, 10s. per cent. Consolidated Stock.
Per Act 51 Vict. ch. 2.

(Redeemable on and after 5th April 1923.)

To the Cashier of the Bank of England.

Capital.	One Quarter's Interest at £2, 10s. per cent. due 5th July 1906.	Less Property Tax at 1s. per £.	Net Dividend.
£100	12 6	7	11 11

PAY *John Jones,* or Bearer, *Eleven shillings and elevenpence.*

5^6 P R^2 3.

Examined.
H. B. ORCHARD,
Chief Accountant.

The Person to whom this Warrant is payable must sign here. } [*John Jones.*]

Warrants outstanding more than Six months after date must be sent to the Bank of England for verification.

N.B.—**Change of Address** should be notified to the Chief Accountant immediately.

TREASURY BILL[1]

Due_____

A. 00001. A. 00001.

£_____

London.

This Treasury Bill entitles[2] _____ or order to payment of £_____ at the Bank of England out of the Consolidated Fund of the United Kingdom, on the_____day of_____.

_____

Secretary to His Majesty's Treasury.

[1] From Chalmers on *Bills of Exchange*.
[2] If this blank is not filled in, the bill will be paid to bearer.

(*b*) FORMS RELATING TO COMPANIES.

MEMORANDUM OF ASSOCIATION OF A LIMITED COMPANY.

1. The name of the Company is "THE WILKINSON TYRE & TREAD CO. (1905), Limited.

2. The Registered Office of the Company will be situate in England.

3. The Objects for which the Company is established are :—

(*a*) To acquire and take over as a going concern the business of manufacturers of patent tyres and non-slipping wearing treads and coverings now carried on by The Wilkinson Tyre & Tread Co., Ltd., at Chapel Hill Mill, Huddersfield, in the County of York, together with certain machinery, plant, fixtures, and stock, and with a view thereto to enter into the Agreement referred to in Clause 3 of the Articles of Association of the Company, and to carry the same into effect with or without modification.

[Then follow general clauses (*b*) to (*t*), conferring all kinds of powers on the Company.]

4. The liability of the members is limited.

5. The capital of the Company is £14,000, divided into 14,000 shares of £1 each. The Company may from time to time increase its capital, and issue any shares in the original or increased capital as ordinary, preferred, deferred, or guaranteed shares, and may attach to any class or classes of such shares any preferences, rights, privileges, or conditions, or may subject the same to any restrictions or limitations.

We, the several persons whose names, addresses, and descriptions are hereunto subscribed, are desirous of being formed into a company, in pursuance of this Memorandum of Association, and we respectively agree to take the number of shares in the capital of the Company set opposite our respective names.

Names, Addresses, and Descriptions of Subscribers.	Number of shares taken by each Subscriber.
Here follow not less than 7 names.	

Dated the 15th day of Feb. 1905.

Witness to the signature of

LIMITED.

____

Shares.

____

No._____

_____ 190

Name _____

_____

Address _____

_____

No. of Shares_____

Distinctive Nos. _____

_____

_____

SHARE CERTIFICATE.

No._____ _____ Shares.

_____ LIMITED.

(Incorporated under the Companies Acts, 1862 to 1900.)

CAPITAL £ , IN SHARES OF £ EACH.

This is to certify that _____

of _____ is the Proprietor of _____

Shares of £ each, on which £ per Share have been paid, numbered

_____ to _____ inclusive, in the _____

subject to the Articles and Regulations of said Company.

Given *under the Common Seal of the Company, this day of* _____ 190 .

_____ } *Directors.*

_____ *Secretary.* _____ }

NOTE.—No Transfer of any of the Shares comprised in this Certificate will be registered until the Certificate has been delivered at the Company's Office.

REGISTERED DEBENTURE.

No.— £—

The——Company, Limited.

SHARE CAPITAL - - £

Offices:

Bankers:

Issue of £ Mortgage Debenture Bonds,
Ranking *Pari Passu.*

THE——(hereinafter called the Company), in consideration of the sum of——pounds paid to them by——of——hereby covenant with the said——his executors, administrators, and assigns, to pay to the said——his executors, administrators or assigns, on the——day of——at the registered office or at the bankers of the Company the sum of £—— on presentation of this debenture, and the Company will in the mean-time pay interest thereon to the registered holder for the time being at the rate of £——per centum per annum by equal half-yearly payments on the——day of——and——day of——in each year, the first payment of interest to be made on the——day of——next. And the Company do hereby charge with such payments the undertaking, stock in trade, lands, premises, works, plant, property, and effects (both present and future) of the Company, to the intent that this security and the other securities forming part of the above-named issue of £—— may rank equally as a first charge upon the said undertaking, stock in trade, lands, premises, and other property and effects, but so that the same shall, until default in the payment of the principal or interest to accrue due and become payable in respect of the said sum of £——or some part thereof, be a floating security not hindering any sale, exchange, or lease of the said lands or premises, or any of them, or the receipt or payment of any moneys, or any other dealings in the course of the business of the Company, but attaching to the premises leased, and the proceeds of any sale or exchange, and the lands or other property purchased therewith or with any moneys of the Company. The principal monies hereby secured shall immediately become payable if the Company make default for a period of one calendar month in the payment of any interest hereby secured, and if the registered holder before such interest is paid by notice in writing to the Company calls in such principal moneys or if an order is made or an effective resolution is passed for the winding up of the Company, the Company reserves to itself the right to pay off all or any of these debentures at its option at any time by giving six months' previous notice in writing to the registered holder.

Given under the Common Seal of the said Company this——day of——One thousand nine hundred and——

——
——
} Directors.

——Secretary.

AMERICAN RAILWAY SHARE CERTIFICATE.

Copied from *Colonial Bank* v. *Cady*.

J. W. Williams, of_____is entitled to 10 shares of 100 dollars each in the capital stock of the New York Central and Hudson River Railway Company, transferable in person or by attorney in the books of the Company only on the surrender and cancellation of this certificate by an endorsement thereof hereon, and in the form and manner which may at the time be required by the transfer regulations of the Company. This certificate, however, is to be of no effect or validity until countersigned by the transfer agent and also by the registrar of transfers of the said Company in the city of New York.

In witness, etc.

Back of Certificate.

For value received_____do hereby sell, assign, and transfer to_____ _____shares of the capital stock of the New York Central and Hudson River Railway Company of 100 dollars each, standing in_____name _____on the books of the Company, and represented by the written certificate. And do hereby irrevocably constitute and appoint_____attorney to execute a surrender and cancellation of the written certificate and also to do all things requisite to transfer the said stock on the books of the said Company in such form and manner as may be necessary or be required by the regulations of the said Company in that behalf, with full power of substitution in the premises.

SCRIP CERTIFICATE.

£100. No. 5781.

IMPERIAL CHINESE GOVT. 5% STERLING LOAN of 1906, for £10,000,000, at 95%.

SCRIP CERTIFICATE for £100.

The BEARER of this Scrip Certificate has paid in respect of One hundred pounds of the above Loan, the sum of £15, leaving a balance of £80, payable as follows:—

£10 per cent. on January 1st, 1907.
£10 per cent. on February 1st, 1907.
£10 per cent. on March 1st, 1907.
£25 per cent. on April 1st, 1907.
£25 per cent. on May 1st, 1907.

After payment of the above instalments the Bearer will be entitled to a duly stamped bond in exchange for this Scrip Certificate. Due notice will be given by advertisement in *THE TIMES* when the Bonds are ready for Delivery.

Default in payment of any Instalment will render all previous payments liable to forfeiture.

For LONDON BANK LTD.
(Signed) A.B.C.
Genl. Mgr.

Registered.
(Signed) D. E. F.
(*Address of Bank*)
London, E.C.
_____ 1906.

RECEIPT FOR INSTALMENT OF £10%. Due January 1st, 1907.

Received _____ 1907, the sum of Ten pounds, being the Instalment due 1st January 1907.

For LONDON BANK LTD.
_____ Cashier.

£10.

RECEIPT FOR INSTALMENT OF £10%. Due February 1st, 1907.

Received _____ 1907, the sum of Ten pounds, being the Instalment due 1st February 1907.

For LONDON BANK LTD.
_____ Cashier.

£10.

RECEIPT FOR INSTALMENT OF £10%. Due March 1st, 1907.

Received _____ 1907, the sum of Ten pounds, being the Instalment due 1st March 1907.

For LONDON BANK LTD.
_____ Cashier.

£10.

RECEIPT FOR INSTALMENT OF £25%. Due April 1st, 1907.

Received _____ 1907, the sum of Twenty-five pounds, being the Instalment due 1st April 1907.

For LONDON BANK LTD.
_____ Cashier.

£25.

RECEIPT FOR INSTALMENT OF £25%. Due May 1st, 1907.

Received _____ 1907, the sum of Twenty-five pounds, being the Final Instalment due 1st May 1907.

For LONDON BANK LTD.
_____ Cashier.

£25.

When remitting the Instalments, this Certificate must accompany the remittance, and in all communications respecting this Certificate, please quote the number and amount. The Receipts must not be detached from the Certificate.

Perforation.

IMPERIAL CHINESE GOVT. STERLING LOAN, 1906.

COUPON for Two pounds ten shillings, due 1st June 1907. Payable at LONDON BANK LTD.
(Initials) A.B.C.

£2, 10s.

There would be a Coupon as here if there is any interest due before the issue of the Bonds.

SHARE TRANSFER UNDER SEAL.

Coupon for £ Stock forwarded to the Company's Office by

in consideration of the Sum of
paid by
hereinafter called the said Transferee
Do hereby bargain, sell, assign and transfer to the said Transferee
of and in the undertaking called
To hold unto the said Transferee , Executors, Administrators, and Assigns, subject to the several conditions on which held the same immediately before the execution hereof; and the said Transferee do hereby agree to accept and take the said subject to the conditions aforesaid.
As Witness our Hands and Seals this day of in the year of our Lord One thousand nine hundred and

Signed, sealed, and delivered by the above-named

Witness's { in the presence of
Signature
Address
Occupation

Seal.

SHARE TRANSFER UNDER HAND.

in consideration of the Sum of
paid to by
Do hereby transfer to the said
Share numbered
standing in name in the books of the Company, Limited.
To hold unto the said
Executors, Administrators, and Assigns, subject to the several conditions on which
held the same at the time of the execution hereof;
And the said
do hereby agree to take the said Share subject to the same conditions.
As Witness our Hands this day of
in the year of our Lord One thousand hundred

Signed by the above-named

Witness's { in the presence of
Signature
Address
Occupation

(c) FORMS OF DEPOSIT RECEIPT AND LETTERS OF CREDIT.

DEPOSIT RECEIPT.

_____ Banking Co., Ltd.,

Date_____

No._____

£_____

Not Transferable.

Received from_____

the sum of_____ _____ sterling

to the credit of_____ Deposit Account with the_____

_____ Banking Co., Ltd., subject to seven days' notice of withdrawal.

_____

Manager.

Entered_____

This Deposit Receipt to be given up on withdrawal of the whole or any part of the deposit

---

COMMERCIAL LETTER OF CREDIT (Open).

No. 709.

Warwickshire Banking Co., Ltd.,
Birmingham.

To_____

_____

July 25th, 1906.

Specimen of the signature of_____

You are hereby authorised to draw on demand upon the Warwickshire Bank, Ltd., to the extent in all of £1000, say One thousand pounds, and we hereby engage with the *bonâ fide* holders and endorsers of all drafts drawn in terms of this credit that the same shall be duly honoured on presentation.

This credit to be in force for six months from date, and the particulars of drafts drawn against it are to be stated on the back thereof.

All said drafts are to be marked as drawn under Letter of Credit No. 709, dated Birmingham, July 25th, 1906.—We are, Your obedient servants,

pp. THE WARWICKSHIRE BKG. CO., LTD.

_____

COMMERCIAL LETTER OF CREDIT (Documentary).[1]

The National Bank of Chicago,
Chicago, Illinois,
£10,000 June 25th, 1903.
To Messrs J. C. Adams & Co., No. G. C. 102.
Smyrna, Asiatic Turkey.

GENTLEMEN,

We hereby authorise you to value on the London, City & Midland Bank, Limited, in London at sixty days' sight, for any sum or sums not exceeding in all Ten thousand pounds sterling, for invoice cost of figs and dates for account of Henry Smith & Co., Chicago, goods to be shipped to the United States.

The Bills of Lading must be issued to the order of the shipper and endorsed in blank.

The shipment must be completed and the bills drawn within six months from this date, and the advice thereof, in duplicate, sent to the London, City & Midland Bank, Limited, London, accompanied by one Bill of Lading and abstract of Invoice, and on receipt of these documents the Bills will be duly honoured.

The remaining Bills of Lading, with certified Invoices and Consular Certificates, must be sent direct to Messrs G. W. Sherwood & Co. of New York City, for account of the National Bank of Chicago, and a certificate to that effect must accompany the draft.

We hereby agree with the drawers, endorsers, and *bonâ fide* holders of drafts drawn under and in compliance with the terms of this Credit, that the same shall be duly honoured upon presentation at the London, City & Midland Bank, Limited, London.

Drafts under this Credit must bear upon their face the words, "Drawn under the National Bank of Chicago Credit No. G. C. 102, dated June 25th, 1903."

Insurance effected here.

Respectfully yours,

(*Signature of bank's officer*)_____

[1] From Margraff's *International Exchange.*

TRAVELLER'S LETTER OF CREDIT.[1]

£300 (amount perforated),
London,_____190 .

No._____

Messrs_____

Gentlemen,

This circular letter of credit will be presented to you by Mr Thomas Brown, and we request you to hold at his disposal the sum of £300, say Three hundred pounds, and to pay him in sums as he may require. Please to endorse hereon any advances made to him, and to draw upon us at sight, which we hereby agree to accept. This credit is to continue in force until the_____190 .

We remain,

Your obedient Servants,

_____, *Manager.*

_____, *Secretary.*

The reverse side is as follows :—

Date.	By whom Paid.	Amount Paid.	Amt. in Figures.

[1] From Cordingley's *Counting House Guide.*

TRAVELLER'S LETTER OF CREDIT.[1]

The National Bank of the Republic of Chicago,
Chicago, Illinois,_____190 .

No._____

£_____sterling.

To the Manager,

This letter will introduce to you M_____ in whose favour we have opened a credit of_____ sterling, and whose sight drafts upon the L. C. & M. Bank, Ltd., of London, we engage shall meet with due honour, if negotiated within_____months from this date.

The amount of each payment you will please endorse on this letter, and your negotiation of the draft will be considered a guarantee that the requisite endorsements have been made. You will please observe that all such drafts be drawn against the Letter of Credit of the National Bank of the Republic, No._____.

This letter must be attached and remitted with the last draft drawn.

Recommending M_____to your usual courtesy,

Yours very truly,

_____

To Messieurs, our Correspondents, and
all other Banks and Bankers to whom
this credit may be presented.

[1] From Margraff's *International Exchange.*

CIRCULAR NOTE.[1]

_____ Bank.

No. _____

LETTRE DE CRÉDIT CIRCULAIRE pour £10 sterling.

Londres, ce _____ 190

À Messieurs les Banquiers
désignés dans notre Lettre d'Indication.

Messieurs,

Cette lettre vous sera remise par M_____, dont vous trouverez la signature dans notre Lettre d'Indication susdite. Nous vous prions de vouloir bien lui compter sans frais quelconques la valeur de Dix livres sterling au cours à usance sur Londres contre sa Traité ci-jointe sur cette Banque.

Nous avons l'honneur d'être,

Messieurs,

Vos très obéissants serviteurs,

_____, Gérant.

_____, Secrétaire.

On the reverse side is—

_____ Bank,
Londres.

£10.

À sept jours de vue préfix payez à l'ordre de M_____, Dix livres sterling, valeur reçue.

À _____

ce _____ 190

[1] From Cordingley's *Counting House Guide.*

LETTER OF INDICATION which accompanies a CIRCULAR NOTE.

Londres, ce_____ 190

Messieurs,

Le porteur de cette lettre, M_____, pour equel nous réclamons vos attentions, est muni de nos Billets de Change Circulaires pour son voyage. Nous vous prions de lui en fournir la valeur sur son double acquit au cours de change à usance sur notre place et sans déductions de frais.

Si la ville où il en touchera le moutant n'a pas de Change direct sur Londres vous voudrez bien en combiner un avec la Place Cambiste la plus voisine.

Vous observerez que tout Agio sur espèces d'or ou d'argent, il tout frais extraordinaires dans le cas d'un remboursement indirect doivent être supportés par le Porteur et ne peuvent être à notre charge.

Cette lettre devant accompagner nos Billets Circulaires doit rester dans les mains de leur Porteur jusqu'à leur équisement.

Nous avons l'honneur d'être,

Messieurs,

Vos très humble et très obéissants serviteurs,

_____, Gérant.

_____, Secrétaire.

(*d*) SHIPPING DOCUMENTS, ETC.

FORM OF MARINE INSURANCE POLICY.[1]

BE IT KNOWN THAT as well in Lloyd's S.G. policy.
own name as for and in the name and names
of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all doth make assurance and cause and them, and every of them, to be insured lost or not lost, at and from
Upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called the whereof is master under God, for this present voyage, or whosoever else shall go for master in the said ship, or by whatsoever other name or names the said ship, or the master thereof, is or shall be named or called; beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship,

upon the said ship, etc.

and so shall continue and endure, during her abode there, upon the said ship, etc. And further, until the said ship, with all her ordnance, tackle, apparel, etc., and goods and merchandises whatsoever shall be arrived at

upon the said ship, etc., until she has moored at anchor twenty-four hours in good safety; and upon the goods and merchandises, until the same be there discharged and safely landed. And it shall be lawful for the said ship, etc., in this voyage, to proceed and sail to and touch and stay at any ports or places whatsoever

without prejudice to this insurance. The said ship, etc., goods and merchandises, etc., for so much as concerns the assured by agreement between the assured and assurers in this policy, are and shall be valued at

Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage:

[1] This is the form given in the first schedule to the Marine Insurance Act, 1906.

they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship, etc., or any part thereof. And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants and assigns, to sue, labour, and travel for, in and about the defence, safeguards, and recovery of the said goods and merchandises, and ship, etc., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured. And it is especially declared and agreed that no acts of the insurer or insured in recovering, saving, or preserving the property insured shall be considered as a waiver, or acceptance of abandonment. And it is agreed by us, the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so we, the assurers, are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured, at and after the rate of

[Sue and labour clause.]

[Waiver clause.]

In Witness whereof we, the assurers, have subscribed our names and sums assured in London.

[Memorandum.] *N.B.*—Corn, fish, salt, fruit, flour, and seed, are warranted free from average, unless general, or the ship be stranded—sugar, tobacco, hemp, flax, hides and skins are warranted free from average, under five pounds per cent., and all other goods, also the ship and freight, are warranted free from average, under three pounds per cent. unless general, or the ship be stranded.

Rules for Construction of Policy.

The following are the rules referred to by this Act for the construction of a policy in the above or other like form, where the context does not otherwise require:—

Lost or not lost. 1. Where the subject-matter is insured "lost or not lost," and the loss has occurred before the contract is concluded,

the risk attaches unless, at such time the assured was aware of the loss, and the insurer was not.

2. Where the subject-matter is insured "from" a particular place, the risk does not attach until the ship starts on the voyage insured. From.

3. (*a*) Where a ship is insured "at and from" a particular place, and she is at that place in good safety when the contract is concluded, the risk attaches immediately. At and from. [Ship.]

(*b*) If she be not at that place when the contract is concluded the risk attaches as soon as she arrives there in good safety, and, unless the policy otherwise provides, it is immaterial that she is covered by another policy for a specified time after arrival.

(*c*) Where chartered freight is insured "at and from" a particular place, and the ship is at that place in good safety when the contract is concluded, the risk attaches immediately. If she be not there when the contract is concluded, the risk attaches as soon as she arrives there in good safety. [Freight.]

(*d*) Where freight, other than chartered freight, is payable without special conditions and is insured "at and from" a particular place, the risk attaches *pro rata* as the goods or merchandise are shipped; provided that if there be cargo in readiness which belongs to the shipowner, or which some other person has contracted with him to ship, the risk attaches as soon as the ship is ready to receive such cargo.

4. Where goods or other moveables are insured "from the loading thereof," the risk does not attach until such goods or moveables are actually on board, and the insurer is not liable for them while in transit from the shore to the ship. From the loading thereof.

5. Where the risk on goods or other moveables continues until they are "safely landed," they must be landed in the customary manner and within a reasonable time after arrival at the port of discharge, and if they are not so landed the risk ceases. Safely landed.

6. In the absence of any further license or usage, the liberty to touch and stay "at any port or place whatsoever" does not authorise the ship to depart from the course of her voyage from the port of departure to the port of destination. Touch and stay.

7. The term "perils of the seas" refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves. Perils of the seas.

8. The term "pirates" includes passengers who mutiny, and rioters who attack the ship from the shore. Pirates.

9. The term "thieves" does not cover clandestine theft or a theft committed by any one of the ship's company, whether crew or passengers. Thieves.

10. The term "arrests, etc. of kings, princes, and people" Restraint of princes.

refers to political or executive acts, and does not include a loss caused by riot or by ordinary judicial process.

Barratry. 11. The term "barratry" includes every wrongful act wilfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer.

All other perils. 12. The term "all other perils" includes only perils similar in kind to the perils specifically mentioned in the policy.

Average unless general. 13. The term "average unless general" means a partial loss of the subject-matter insured other than a general average loss, and does not include "particular charges."

Stranded. 14. Where the ship has stranded, the insurer is liable for the excepted losses, although the loss is not attributable to the stranding, provided that when the stranding takes place the risk has attached and, if the policy be on goods, that the damaged goods are on board.

Ship. 15. The term "ship" includes the hull, materials and outfit, stores and provisions for the officers and crew, and, in the case of vessels engaged in a special trade, the ordinary fittings requisite for the trade, and also, in the case of a steamship, the machinery, boilers, and coals and engine stores, if owned by the assured.

Freight. 16. The term "freight" includes the profit derivable by a shipowner from the employment of his ship to carry his own goods or moveables, as well as freight payable by a third party, but does not include passage money.

Goods. 17. The term "goods" means goods in the nature of merchandise, and does not include personal effects or provisions and stores for use on board.

In the absence of any usage to the contrary, deck cargo and living animals must be insured specifically, and not under the general denomination of goods.

BILL OF LADING. FORM 1. (Very simple.)

Shipped in good Order and well conditioned by

_____

in and upon the good Steam Ship called the_____
whereof is Master for this present voyage_____
and now riding at anchor in_____
and bound for

being marked and numbered as in the Margin, and are to be delivered in the like good Order and well conditioned at the aforesaid Port of_____(the Act of God, the King's Enemies, Fire, Machinery, Boilers, Steam, and all and every other Dangers and Accidents of the Seas, Rivers, and Steam Navigation, of whatever nature and kind soever excepted) unto_____or to _____Assigns_____Freight for the said Goods

_____

with primage and Average accustomed. **In Witness** whereof the Master or Purser of the said Ship hath affirmed to _____ Bills of Lading all of this Tenor and Date, the one of which_____ Bills being accomplished, the other _____to stand void.

Dated in London_____190____

Weight and contents unknown.

BILL OF LADING. Form 2. (More elaborate, and containing a reference to the Charter Party.)

Mediterranean, Black Sea and Baltic Grain Cargo Steamer Bill of Lading, 1890.

Shipped in good order and condition, by _____
in and upon the good Steamship called the _____ under
_____ Flag, whereof _____
is Master for this present voyage, now lying in _____
and bound for _____, with liberty to call at any ports on the way for coaling or other necessary purposes, to sail without Pilots, and to tow and assist Vessels in distress, and to deviate for the purpose of saving life: _____

and to be delivered in the like good order and condition at the aforesaid port of _____ unto _____,
or to his or their assigns, he or they paying freight and/or demurrage, if any, for the said goods and all conditions and exceptions of the Charter Party, dated _____ are incorporated herewith.
The Act of God, Perils, Dangers, and Accidents of the Sea or other Waters of what nature and kind soever; Fire from any cause on Land or on Water Barratry of the Master and Crew, Enemies, Pirates and Robbers, Arrests and Restraints of Princes, Rulers and People, Explosions, Bursting of Boilers, Breakage of Shafts, or any latent defect in Hull, and/or Machinery, Strandings, Collisions, and all other Accidents of Navigation, and all Losses and Damages caused thereby are excepted, even when occasioned by negligence, default or error in judgment of the Pilot, Master, Mariners, or other Servants of the Shipowners, but, unless stranded, sunk or burnt, nothing herein contained shall exempt the Shipowner from liability to pay for Damage to Cargo occasioned by bad Stowage, by improper or insufficient Dunnage, or absence of customary Ventilation, or by improper opening of Valves, Sluices and Ports, or by causes other than those above excepted, and all the above exceptions are conditional on the Vessel being Seaworthy when she sails on the Voyage, but any latent defects in the Hull and/or Machinery shall not be considered unseaworthiness, provided the same do not result from want of due diligence of the Owners, or any of them, or by the Ship's Husband or Manager.

General Average payable according to York-Antwerp Rules, 1890.

_____ laying days have been used at the Ports of Loading.

In Witness whereof, the Master of the said Ship hath affirmed to three Bills of Lading, all of this tenor and date, one of which Bills being accomplished, the others to stand void.

Dated in _____ this _____ day of _____ 19 .

WEIGHT, QUANTITY AND QUALITY UNKNOWN.

BILL OF LADING. FORM 3. (Very elaborate terms, contained in a Schedule.)

Shipped in good order and condition by

on board the STEAM SHIP
whereof is Master, now
lying at London,
Packages Merchandise,

being marked and numbered as per margin, to be delivered subject to the exceptions and conditions enumerated below in like good order and condition at or off CAPE TOWN,

unto
or to his or their Assigns. Freight, Primage and Charges payable on shipment, ship lost or not lost; the Ship retaining a lien on the Goods for all Freight, Primage and Charges until paid, whenever and wherever payable; average as per York-Antwerp rules, 1890, and charges as accustomed.

In Witness whereof the Master or Agent of the said Vessel hath affirmed to three Bills of Lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated at LONDON, this day of
190 .

The following are the exceptions and conditions referred to above—[*Here follow twenty stipulations*].

FOR THE MASTER,

CONSULAR INVOICE.—[A slightly different form is used where the an agent for sale. The list of goods is

All blanks in these three columns to be filled in by Shipper. The form of

[FORM NO. 140.]

CONSULAR CERTIFICATE.

I, the undersigned, Deputy-Consul-General of the United States, do hereby certify that, on this[4] ____ day of _____, A.D. 190 , the invoice described in the indorsement hereof was produced to me by the signer of the annexed declaration.

I do further certify that I am satisfied that the person making the declaration hereto annexed is the person he represents himself to be, and that the actual market value or wholesale price of the merchandise described in the said invoice in the principal markets of the country at the time of exportation is correct and true, excepting as noted by me upon said invoice, or respecting which I shall make special communication to the proper authorities.

_____

_____

_____

_____

_____

_____

_____

Fee $2.50 United States gold, paid by affixing stamp to the duplicate copy of this document.

Witness my hand and seal of office the day and year aforesaid.

Received the equivalent of $2.50 in gold.

_____

Deputy United States Consul-General, London, England.

Directions.

1. Full names of Deponent.

2. Address.

3. 'Purchaser' or Seller.'

4. Date.

5. Port.

6. Signature of Deponent.

[FORM NO. 138.]

DECLARATION OF PURCHASER OR SELLER.

I,[1] _____

the undersigned, of[2] _____

_____

do solemnly and truly declare that I am[3] _____

_____

of the merchandise in the within invoice mentioned and described; that the said invoice is in all respects correct and true, and was made at LONDON, whence said merchandise is to be exported to the United States; that said invoice contains a true and full statement of the time when, the place where, and the person from whom the same was purchased, and the actual cost thereof, price actually paid or to be paid therefor, and all charges thereon; that no discounts, bounties or drawbacks are contained in said invoice but such as have been actually allowed thereon; that no different invoice of the merchandise mentioned in said invoice has been or will be furnished to any one, and that the currency in which said invoice is made out is that which was actually paid or is to be paid for said merchandise.

_____

_____

_____

I further declare that it is intended to make entry of said merchandise at the port of[5]

_____

in the United States of America.

Dated at LONDON, this

____ day of _____ 190 .

[6] _____

goods are not sold but consigned to made out on the Form on the back.]

Invoice on the other side to be used.

Purchased by Importer.

Invoice No. } _____ *(leave blank.)*

Here mark the forms "Original," "Duplicate," and "Triplicate" respectively:

.....

Issued in } Triplicate. Quadruplicate.

Consulate-General of the United States,

AT

LONDON, ENGLAND.

Date _____ 190 .

Sellers _____

Address _____

Purchaser _____

_____

Name of Vessel _____

Port of Shipment, LONDON.

Port of arrival _____

Port of entry _____

Value £ _____

Contents _____

_____

LONDON, ENGLAND.

Custom-House Indorsement.*

No. _____

Importer _____

Vessel _____

From _____

Arrived _____

KIND OF ENTRY:

_____

_____

Marks, Quantity, & Contents:

* Consular Officers will leave all of above indorsement blank. It is to be filled in only at the custom-house at the port of entry.

MATE'S RECEIPT.

FORM 1.

Received in good order and condition on board the ship _____, Captain _____, for _____.

From THOMAS BROWN,
18 Cornhill, E.C.

Marks.	Quantity and Description of Goods.
T. B. 5.	Thirty-five bags of Coffee.

Signed _____
Chief Officer.

Date _____

MATE'S RECEIPT.

FORM 2.

The Asiatic Steamship Company, Ltd.
Direct line to and from China.

Port of _____ _____ 190

Received in apparent good order and condition on board the S.S. _____ for delivery at _____ subject to the conditions of the Bills of Lading of this line.

Marks.	Quantity.	Goods said to be	Remarks.

_____
Officer's signature.

Name of Shipper _____

DOCK WARRANT.

LONDON AND INDIA DOCKS CO.

Dock Lot No. Rotation

Dated this _____ 1901

WARRANT for *(such and such goods)*
imported in the ship _____ Master _____
from _____ entered by _____
on the *(date)* _____ deliverable to _____
or Assigns by endorsement hereon.

Rent commences on the *(date)* _____ and all other charges from the date hereof. _____ Rate charged.

Mark and No.	Landing Weight.	Tare.

Ledger No. _____ Folio _____

_____ Clerk. _____ Warrant Clerk

WAREHOUSE WARRANT.

London and India Docks Company, St Katherine Dock.

Tea Department.

No._____ Rotation_____
Lot_____ Customs_____

Dated_____ 190

WARRANT for_____ (quantity) _____ tea entered by_____
on the_____ (date) _____ and_____ declared by the importer to be_____
imported in the ship_____ Master_____ from_____
and sold by_____ deliverable to_____ or Assigns by
endorsement hereon, subject to the conditions hereon named.

Prompt_____ (date) _____ 190 . Rent commences_____ (date) _____ 190 ,
and all other charges from the date of this warrant.

OBSERVE.

A weight note for these goods has been issued, and no delivery will be made under this warrant before the expiration of the prompt without the production of such weight note.

The possessor of the weight note is entitled to the warrant upon complying with the conditions of sale and paying the balance of the purchase money as expressed on the weight note on or before the expiration of the prompt.

After partial deliveries this warrant will be returned, and the bearer thereof entitled to the remainder of the teas.

Mark.	Numbers.	Customs landing weight. Cwt.	qrs.	lbs.	Customs tare lbs.	Sale tare lbs.	draft lbs.	DELIVERIES. (These particulars to be filled up by the applicant.) Date.	Nos.	On whose account, and signature of bearer.	Conveyance.	Customs Order No.	Clerk's Initials.	Delivery foreman's initials and date of delivery.
	Tare			lbs.	lbs.					*Ledger*____	*To*			
	Net			or						____ *Clerk.*				*Warrant Clerk.*

DELIVERY ORDER.

75 Cornhill, London, E.C.,
No. 74. July 25th, 1906.

To the Superintendent of _____

Please deliver to _____ the under-mentioned goods, entered by _____ on _____ in the ship _____ Captain _____ from _____

Charges from _____ to be paid _____

Mark.	No.		

(e) FORMS OF SECURITIES FOR ADVANCES.

MEMORANDUM OF DEPOSIT OF DEEDS.

Memorandum that on the day of One thousand nine hundred and

hath delivered to

at their office in in the County of

the several Conveyances, Assignments and Muniments of Title mentioned and comprised in the Schedule hereunto annexed for the purpose of securing to the Proprietors in the said Banking Company for the time being of whomsoever the same Banking Company may from time to time consist all and every sum and sums of money which shall at any time hereafter be due or owing from the said

on the balance of his Account Current with the said Banking Company, either for money paid or advanced or to be paid or advanced by the said Banking Company unto the said

or at his request, or which shall be secured by any Bond or Bill of Exchange drawn or indorsed by the said

or by any Promissory Note or other Contract whatsoever, with interest for the same respectively from the several times at which they respectively shall be advanced, or at which the said Bonds, Bills, Notes or other Contracts respectively shall become due and thenceforth until payment thereof respectively after the rate of

per centum per annum with Commission and other usual Bankers' Charges so as the same do not exceed in the whole the sum of

AND the said

doth hereby charge all the hereditaments and premises comprised in the said Conveyances, Assignments and Muniments of Title with the payment to the said Banking Company of the said sum of

and interest thereon at the rate aforesaid according to the true intent of these Presents. AND the said

doth hereby promise and agree with and to the said Banking Company that he the said
whenever thereunto required will execute a valid legal Mortgage of the hereditaments and premises comprised in the said Deeds and writings unto and to the use of the said Banking Company in such manner as shall be lawfully required by them free from incumbrances, Subject nevertheless to redemption on payment by the said
of such sum of money as shall be therein expressed to be secured with interest in manner aforesaid. AND in the said Indenture of Mortgage shall be contained all usual and proper powers, clauses and covenants. AND IT IS HEREBY AGREED that as soon as the principal moneys and interest hereby secured shall be fully paid and satisfied the said Banking Company, their executors, administrators or assigns shall forthwith, at the cost of the said
his heirs, executors, administrators or assigns, deliver up all the said Conveyances, Assignments and Muniments of Title undefaced and uninjured (accidental damage by fire only excepted) to the said
his heirs, executors, administrators or assigns, or as he or they shall direct.
AS WITNESS the hand of the said
the day and year before written.

Witness,

THE SCHEDULE ABOVE REFERRED TO.

MEMORANDUM OF DEPOSIT OF SHARE CERTIFICATES.

Memorandum that

have deposited with

the several Scrip and Stock and Share Certificates enumerated in the Schedule hereunder written for the purpose of securing to the said

all and every sum and sums of money which shall at any time hereafter be due or owing from the said

on the balance of Account Current with the said

either for money paid or advanced, or to be paid or advanced, by the said
unto the said
or at request, or which shall be secured by any Bond or Bill of Exchange drawn or indorsed by the said

or by any
Promissory Note or other Contract whatsoever, with interest for the same respectively from the several times at which they respectively shall be advanced, or at which the said Bonds, Bills, Notes or other Contracts respectively shall become due and thenceforth until payment thereon respectively after the rate of per centum per annum with Commission and other usual Bankers' charges. And the said

doth hereby promise and agree with and to the said

that the said
whenever thereunto required, will execute a valid legal transfer of the marketable securities represented by the said scrip and certificates unto and to the use of the said

in such manner as shall be lawfully required by them. And it is hereby agreed that as soon as the principal moneys and interest hereby secured shall be fully paid and satisfied, the said
their executors, administrators, or assigns shall forthwith deliver up all the said scrip and certificates undefaced and uninjured (accidental damage by fire only excepted) to the said
heirs, executors, administrators, or assigns, or as he or they shall direct.
As witness the hand of the said
this day of One thousand nine hundred

WITNESS

THE SCHEDULE ABOVE REFERRED TO.

MEMORANDUM OF DEPOSIT FOR STOCKS AND SHARES.

[*Another Form.*]

London,_____1906.

In consideration of your advancing to me the sum of £_____ say_____pounds as a loan for_____months at interest at the rate of_____per cent. above Bank rate, but not less than_____ per cent. per annum, I deposit in your hands the under-mentioned documents and securities to be held by you as collateral security for the due repayment of the said loan and of the general balance for the time being due from me to you upon any account or accounts whatsoever which I either solely or jointly with any other person or persons may have with you, including and together with interest, commission, law and other costs and your usual banking charges.

I declare that the securities are this day of the saleable value of £_____at the least, and that they are within my own disposition and control and are free from any prior charge and incumbrance, and I undertake and agree at all times, while any money remains hereby secured, to keep in your hands, as part security for payment of the sums hereby secured, approved securities of an amount equivalent in value at the market price of the day to_____per cent. above the sums for the time being secured hereby. And in the event of a fall of or diminution of the value of the said securities according to the current market price of the day, I hereby agree to provide you with such additional security to your satisfaction or to pay off so much of the loan as shall restore the said margin; and failing this, or in case of non-payment when due or on demand, as the case may be, I hereby authorise

and empower you to sell and dispose of the above-mentioned securities or any of them as you shall in your absolute discretion think fit, and to apply the moneys arising from such sale or sales in discharge of the costs incurred therein, and afterwards in or towards payment of the moneys hereby secured whether due or demanded or not, and to pay the residue to

_____.

In the event of the proceeds of the sale not being sufficient to repay the whole of the moneys due to you, I undertake to pay you any difference between the net proceeds of the securities and the amount due to you as well as all charges and expenses of realisation.

And I hereby engage, whenever called upon, to execute at my own expense a proper assignment or transfer of the above securities or any of them, with power of sale and all other necessary powers for securing the same moneys to you or to such person or persons as you may appoint.

Witness,

Stamp 6d.

Signature of borrower.

List of Securities.

Particulars.	Price.	Declared market value.

GENERAL LETTER OF HYPOTHECATION OF DOCUMENTARY BILLS.

To the_____Bank.

1. As you may from time to time purchase from or negotiate for $\frac{\text{me}}{\text{us}}$ Bill or Bills of Exchange drawn or endorsed by $\frac{\text{me}}{\text{us}}$ with collateral securities, it has been agreed between us that the stipulations contained in this Memorandum shall be deemed to be continuing and ambulatory, and are to apply to all cases in which such Bills of Exchange may at any time, either directly or through other persons, be negotiated with or sold to you by $\frac{\text{me}}{\text{us}}$, and this Memorandum shall have the same force until $\frac{\text{I}}{\text{we}}$ shall give you notice of $\frac{\text{my}}{\text{our}}$ intention to terminate it, as if a separate Memorandum were signed by $\frac{\text{me}}{\text{us}}$ on each purchase or negotiation.

2. $\frac{\text{I}}{\text{we}}$ authorise you or any of your Managers, or Agents, or the Holders for the time being of any such Bill or Bills as aforesaid (but not so as to make it imperative) to insure any goods forming the collateral security for any such Bill or Bills of Exchange from sea risk, including loss by capture, and also from loss by fire on shore, and to add the premiums and expenses of such insurances to the amount chargeable to $\frac{\text{me}}{\text{us}}$ in respect of such Bill or Bills, and to take recourse upon such goods in priority to any other claims thereon, or against $\frac{\text{me}}{\text{us}}$, without prejudice to any claim against any endorser or endorsers of the said Bills, for reimbursing yourselves, or other the person or persons paying the same, the amount of such premiums and expenses, and also to sell any portion of such goods which may be necessary for payment of freight, insurance, and expenses, and generally to take such measures and make such charges for commission, and to be accountable in such manner but not further or otherwise than as in ordinary cases between a merchant and his correspondent. And $\frac{\text{I}}{\text{we}}$ consent to the goods being warehoused at any public or private wharf or warehouse selected by the Drawees or Acceptors of the Bills, unless you offer an objection to such wharf or warehouse.

3. $\frac{\text{I}}{\text{we}}$ hereby also authorise you, or any of your Managers, or Agents, or the Holders for the time being of any Bill or Bills of Exchange as aforesaid, to take conditional acceptances to all or any of such Bills, to the effect that, on payment thereof